House Committee on the Judiciary

Subcommittee on the Constitution

Testimony of Jeanne C. Finegan

November 18, 2004

INTRODUCTION

My name is Jeanne C. Finegan. I am the President of Capabiliti, L.L.C., a communications consulting and public relations firm, which works in collaboration with Poorman-Douglas Corporation (hereinafter "P-D"), a company that specializes in the implementation and administration of Class Action and Bankruptcy media notification campaigns and claims administration services. Additionally, I am formerly the Vice President and Director of Huntington Legal Advertising (hereinafter "HLA"), a division of P-D, and was at the time when the Court approved the Consent Decree and notice program in Pigford v. Glickman, Civ. Act. N. 97-1978 (PLF) (US. Dist. D.C.) (hereinafter "Pigford").

I have over 20 years of experience in the field of communications. I am a public relations professional accredited by the Universal Accreditation Board of the Public Relations Society of America. I have lectured and written extensively on the issue of notice. I have provided expert testimony regarding notification campaigns and conducted media audits of proposed notice programs for their adequacy under Fed. R. Civ. P. 23(c)(2) and similar state class action rules. My biography is included as **Exhibit 1**.

I have extensive experience in implementing legal notice programs in consumer, environmental, anti-trust, medical and product liability class actions, as well as various bankruptcy cases. I have served as a qualified legal notice expert in many of the most significant consumer class action lawsuits in the United States. Courts have recognized the merits of, and admitted expert testimony based upon my evaluation of the effectiveness of notice programs. I have implemented notice programs in hundreds of class action and bankruptcy cases, highlights of which are reflected in Exhibit 1.

Background

The Consent Decree in Pigford established the legal notice program which Poorman-Douglas, coordinated, through its division, Huntington Legal Advertising. A copy of the Consent Decree is attached hereto as **Exhibit 2**, which was preliminarily approved by the Court on January 5, 1999.[1] In this case, as in the notice programs P-D and HLA have implemented in other Class Action and similar settlements, the goal was to reach as many of the potential claimants as possible and notify them of their rights and the attendant responsibilities necessary to maintain those rights.

Legal Notice Administrators are often asked to do research and make recommendations on media selection for the target class. We were asked to do so in Pigford. While legal notice administrators may recommend a course of action, they do not make the ultimate decision on which notice program is to be implemented. After counsel for the parties conclude negotiations to determine the terms and timing of the settlement, and after the Court approves the settlement, the notice administrator develops the final notice program, consistent with the settlement and in consultation with the parties. Once the notice program is approved by the Court, the program is carried out as it was approved, absent unforeseen circumstances. Even in such cases, changes are undertaken only in consultation with the parties and with approval of the Court. The Pigford matter's legal notice program development and implementation followed this normal sequence of events, as detailed in Exhibit 3 and discussed further below.

In Pigford, P-D's class action case administration services included coordination of the direct mail notice process; formatting of the direct mail notice; coordination with the U.S. Postal Service; database management and preparation of affidavits for the Court regarding the services provided. HLA, under my direction, implemented the paid advertising, media and public relations components of the notice program as approved by the Court. My affidavit filed in the Pigford matter, dated February 19, 1999, is attached hereto as **Exhibit 3** and details the

[1] The Consent Decree specified the following requirements for the class notice procedure:

a. Mail a copy of the Notice of Class Certification and Proposed Class Settlement to all then-known class members.

b. Arrange to have 44 commercials aired on the Black Entertainment Network and 18 similar commercials on Cable News Network, during a two week period.

c. Arrange to have one-quarter page advertisements placed in 27 general circulation newspapers and 115 African-American newspapers in an 18-state region.

d. Place a full page advertisement in the editions of TV Guide distributed in that 18 state region and a half page ad in the national edition of Jet Magazine.

implementation of the notice program as well as the estimated performance measures on the broadcast and print advertising components of that campaign.

INTRODUCTION TO DEVELOPMENT OF LEGAL NOTICE PROGRAMS

Legal Framework

The legal requirements for an adequate class action notice campaign under the Federal Rules of Civil Procedure are well enumerated in the several district and appellate court opinions regarding this case. Copies of these opinions are attached hereto as **Exhibit 4**. Most significant to the issue of notice, the District Court concluded that

> class members have received more than adequate notice and have had sufficient opportunity to be heard on the fairness of the proposed Consent Decree…. [T]he timing and breadth of notice of the class settlement was sufficient under Rule 23.[2]

The court went on to note that "[t]he parties also exerted extraordinary efforts to reach class members through a massive advertising campaign in general circulation and African American targeted publications and radio and television stations."[3]

Additionally two U.S. Supreme Court decisions (Daubert v. Merrell Dow Pharmaceuticals 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael 526 U.S. 137 (1999)) relating to the admissibility of scientific or other specialized knowledge are instructive in the approach and methodology that must be followed in the development of a scientifically based media program. To ensure the methodological reliability that underlies the development of a notification plan, as experts, we base our plan development recommendations on the use of: 1) advertising industry accepted methodology; and 2) techniques that can be tested by peers. As reflected in Exhibit 4, and discussed in more detail below, scientifically sound, effective and appropriate methodology was used to develop and implement the notice plan in Pigford.

Media Program Development & Analysis Methodology

Human behavioral science provides the scientific basis for the development of effective communications and, in this context, legal notification programs. In addition to the legal notice requirements of the Federal Rules of Civil Procedure, like with any advertising campaign, two

[2] Exhibit 4, Pigford v. Glickman, 185 F.R.D. 82, 101-102 (D.D.C. 2000).
[3] Id. at 102. The court also noted that with the exception of one objection from United States Virgin Islands, "no one appears to believe that the scope of the notice provided was insufficient." Id.

primary goals of a legal notice program are to 1) create awareness; and 2) solicit a response from the target audience. [4] To act on the message delivered is a decision within the control of the class member and this decision is influenced by many factors.[5] Legal Notice campaigns must take into consideration and address these realities and communication obstacles. Both the message and the selection of media should reflect these principles.

Class Member Definition

In any legal notice program, both the demographic and psychographic profiles of potential Class Members must be taken into account for it to be a targeted and efficient notice program. The Notice Program and its analysis in the Pigford case were based on nationally syndicated media research provided by Mediamark Research, Inc. (hereinafter "MRI"). MRI is the leading supplier of multimedia audience research (nationally syndicated data) in the United States.[6] MRI bases its calculations for net audience reach on its proprietary. This type of data is widely used by companies as a basis of their media and marketing plans and the type of data upon which legal notice experts rely to define the target class and recommend the most effective combination of media vehicles to get legal notice to the target class.[7]

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[4] As outlined in EFFECTIVE PUBLIC RELATIONS by Cutlip, Center & Broom (8th Ed. 1999), a widely used text in academic advertising and public relations programs across the United States, information campaigns succeed when:

1) They are programmed around the assumption that most of the publics to which they will be addressed will be either only mildly interested or not at all interested in what is communicated.

2) Middle-range goals which can be reasonably achieved as a consequence of exposure are set as specific objectives [setting realistic goals]. Frequently it is equally important either to set up or to utilize environmental support systems to help sheer information giving to become effective in influencing behavior.

3) If after middle-range objectives are set, careful consideration is given to delineating specific targets in terms of their demographic and psychographical attributes, their life-style, value and belief systems, and mass media habits. Here, it is important not only to determine the scope of prior indifference, but to uncover its roots as well.

Quoting seminal research by human behavioral scientist Harold Mendelsohn, "Some Reasons Why Information Campaigns Succeed," Public Opinion Quarterly 37 (Spring 1973) 412-23.

[5] There are many barriers to successful message dissemination, some of which include indifference, skepticism and fatigue on the part of the target audience. Harper, "What Advertising Can and Cannot Do," presented to the Marketing Conference of the Conference Board, October 20, 1976, obtained from the American Association of Advertising Agencies.

[6] As indicated on its website: "[a]s the leading U.S. supplier of multimedia audience research, MRI provides information to magazines, television, radio, Internet and other media, leading national advertisers and over 450 advertising agencies - including 90 of the top 100 in the United States. Mediamark's national syndicated data are widely used by these companies as the basis for the majority of the media and marketing plans that are written for advertised brands in the United States." Http://www.mediamark.com/, last viewed on November 15, 2004.

[7] MRI surveys adults 18 years of age and older for product and media usage habits. Annually, it surveys more than 25,000 consumers throughout the continental United States and provides data on a syndicated basis. The survey methodology uses a personal interview and self-administered questionnaire. A doublebase report (which is the type of report used in recommendations made for the Pigford media program) provides information on more than 50,000 consumers surveyed and is a more reliable base for smaller target audiences than a single year's report.

Components to a Legally Defensible Notice and Measurement of an Effective Notice Program

All recommendations on the paid advertising and media/public relations components of the legal notice program were developed using scientific methodology accepted within the advertising industry. This would include 1) identification and modeling of target class members by their demography and media consumption habits; and 2) recommendations on notice dissemination, based upon the media consumption habits of the target class members. Again, the goal is to achieve the most effective notice possible under the circumstances of the case and maximize the success of the information campaign. Recommendations made on this basis allow the parties and the Court to select the media or combination of media that would best achieve the program goals.

Within the context of a class action, it is ultimately the terms of the settlement (as agreed to by the parties and approved by the Court) that dictate the notice plan that is ultimately implemented. The notice administrator may make recommendations to the parties in advance of their seeking court approval, but the final plan, including the form and manner of notice, reflects the order of the Court.

The analysis in the Pigford case included modeling target groups demographically and psychographically, as noted above. However, as with all social sciences there is no one absolute formula for making these recommendations. The calculation of human behavior and media consumption is a not an exact science. Instead it is a combination of science and judgment based on experience. It should be noted that calculations are projections and hand-in-glove with projections are variations. This does not mean that one calculation is right and the other wrong. It simply means that there are variations based on the model one uses and the platform upon which the calculation is formulated.

Media Performance

An integrated media program provides the most effective legal notice campaign when it is comprised of various elements, including direct mail, newspaper, magazine and broadcast advertising, and public relations to disseminate the notice because this multimedia approach

helps to achieve higher audience reach and greater frequency of message.[8] These media vehicles are recommended based upon the target class members' demographic and psychographical attributes, and mass media habits researched as discussed above.

One issue exists with regard to scientific measures of a program's success: not all components can be measured to the same degree that the paid advertising component is measured. Print and broadcast media performance (estimates on the reach and frequency) in Pigford were based on the data provided by Mediamark Research, Inc. and Nielsen Media Research. Other elements included in the Court-ordered notice program also contributed significantly to the reach and frequency, but cannot be as definitively measured, nor can they be combined with the media performance estimates.[9]

PIGFORD NOTIFICATION PROGRAM

Pursuant to the Consent Decree, the direct mail component of the notification program commenced on January 20, 1999, while the rest of the communication program commenced on January 18, 1999 and was substantially completed by January 30, 1999. Prior to the claims filing deadline, a total of 52,736 claims packages and 192,277 Schedules of Meetings were distributed (indicating the date and time of almost 200 informational meetings about the settlement scheduled around the United States during the notice period).

The media and public relations components were executed and performed as required by the Consent Decree and detailed in Exhibit 3 and as summarized below.

Pigford Notice Program Objectives

The purpose of the notice program designed and implemented in the Pigford case was to alert those African-American farmers who had been discriminated against by the Department of Agriculture, to advise them of their opportunity to participate in the lawsuit, and to inform them

[8] Frequency is the average number of times the individuals (or homes) are exposed to an advertising schedule within a specific period of time. Independent studies conducted by Hubert Zielske, "Remembering and Forgetting of Advertising," Journal of Marketing 23 (March 1959) 239-43, and Leon Jakobovits, "Semantic Satiation and Cognitive Dynamics," American Psychological Association meeting paper, September 1966, concur that unless an individual is exposed often enough within a short enough interval, there is little point in reaching him/her at all. "The clustering of ad messages over a short period of time increases recollection." Surmanek, MEDIA PLANNING, A PRACTICAL GUIDE (3rd Ed. 1996).

[9] The one exception to this statement is the contribution to the overall effectiveness of the campaign achieved by the print articles and television news stories which resulted from the media and public relations campaign. This can be analyzed at the conclusion of a campaign, and to the extent possible five and a half years later, has been reviewed.

of their rights and obligations under the terms of the Consent Decree, including important information regarding the Court approval of the Consent Decree.

Pigford Class Definition vs. Media Definition

As reflected in Exhibit 2, the class in Pigford was defined as: All African-American farmers who (1) farmed between January 1, 1981, and December 31, 1996; and (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response that that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.[10]

Additionally the Court certified three subclasses, defined as:

> Subclass I: African-American farmers, who have a file with Defendant, but did not receive a written determination from Defendant in response to their discrimination complaint;
>
> Subclass II: African-American farmers, who have a file with Defendant, who received a written determination from Defendant in response to their discrimination complaint but who maintain that the written determination from Defendant was not reached in accordance with law; and
>
> Subclass III: African-American farmers, who do not have a file with Defendant because their discrimination complaints were destroyed, lost or thrown away by Defendant.[11]

The ability to define and model target class members by their demography and media consumption habits is limited by the definitions used and information gathered by advertising and public relations research firms like MRI. Thus the media definitions used to evaluate program reach and frequency do not always perfectly translate to a class definition. Therefore it is important to use a media definition that is as targeted as possible, while erring on the side of over inclusion to ensure that all potential class members are identified and measured in the defined media program.

For the Pigford case, the media definition provided by MRI that most closely resembled the class definition while ensuring inclusion of all potential class members, included all African-

[10] Exhibit 2 at page 5.
[11] Id.

American farm operators, managers or others in farm-related industries.[12] The estimated size of the MRI defined class was 143,000 individuals. This data allowed HLA to recommend the media vehicles that had the highest reach and index of the target audience.[13]

Performance of Pigford Media Program

Exhibit 3 contains the details on the media program implemented pursuant to the terms of the Consent Decree in Pigford.[14] Looking to the broadcast and print (or "paid") media components alone (because of the measurability and combinability issues discussed above), on average, these two elements of the media program in the Consent Decree reached an estimated 87% of the MRI defined class ("media definition") and that class had the opportunity to view the summary settlement notice approximately 2.4 times.[15]

The reach and frequency statistics discussed above and reflected in Exhibit 3 do not take into account the other opportunities, contemplated by the Consent Decree, that potential class members had to view the class notice. These additional opportunities were provided by direct mail, newspaper and magazine articles, editorials, radio and television news stories as a result of the media and public relations campaign and the informational meetings scheduled, all of which were a part of the Court ordered Pigford notice program.[16] These components, although not fully quantifiable, contributed to its reach, message frequency and overall effectiveness.

[12] MRI's Doublebase 1998 report was used for analysis of the media habits of the target class in Pigford. The Pigford Doublebase report is based on Wave 35, 36, 37 and 38 interviews. The period of MRI fieldwork (the personal interviews) was as follows:

Wave 35 March 1996 to July 1996
Wave 36 September 1996 to January 1997
Wave 37 March 1997 to August 1997
Wave 38 September 1997 to February 1998

[13] The "index" is "[a] form of percentage that relates numbers (variables) to a base, with the base always representing 100" and the "index" shows the change in magnitude relative to the base. Surmanek, ADVERTISING MEDIA A TO Z (2003). For example, members in the Pigford target audience were 866% more likely than the general public (base population) to read Jet magazine per the MRI 1998 Doublebase report.

[14] Class notice procedures are outlined in the Consent Decree on pages 7 and 8 (Exhibit 2).

[15] Exhibit 3 at 6. In fact, the measurable reach and frequency from the paid media campaign is slightly higher since it was discovered after the date that Exhibit 3 was signed and filed that there were several additional television spots aired on selected stations, which were not anticipated in the original broadcast media program.

[16] For example, there were almost 200 information meetings held around the country in the regions where there were the largest concentration of class members. Additionally, a recent survey of the media coverage of the Pigford Settlement during the notice period (or at least those that were available five and a half years later) generated as a result of the media/public relations campaign, shows that this additional media coverage, delivered significant additional opportunities for class members to view and receive relevant case information, increasing the reach and frequency of Pigford's notice program. Alone, the segment regarding the case aired on CBS's 60 Minutes on July 4, 1999 had 1,150,000 black adult viewers over the age of 25.

CONCLUSION

I would be happy to answer any questions the Committee may have about any aspect of our work on the Pigford notice program. As negotiated by the Parties and approved by Judge Friedman, that notice plan met its goals by advising potential claimants of their rights in a manner reasonably designed to give them an opportunity to assess what course of action, if any, they should follow. Like any notice plan, perhaps with more time and money, the court-approved plan may have achieved enhanced results. But that is pure speculation. What is fact is that the notice plan triggered a substantial response from potential claimants. For example, we fielded 96,000 telephone calls were fielded in response to the notice before the October 12th 1999 cut-off date. Based on that experience and generally-accepted measures, the Pigford notice program adopted by the Parties and Judge Friedman achieved its objectives.

LIST OF EXHIBITS

I. **Biography for Jeanne C. Finegan**

II. **Consent Decree signed by the Court Dated April 14, 1999**

III. **Affidavit Dated February 19, 1999**

IV. **Copies of Opinions on the Notice Program**

I. Biography for Jeanne C. Finegan

JEANNE C. FINEGAN, APR

BIOGRAPHY

Capabiliti L.L.C., President, Jeanne Finegan, APR has more than 20 years of communications and advertising experience. She is a nationally recognized specialist in class action notification campaigns. Finegan is accredited (APR) in Public Relations by the Universal Accreditation Board, a program administered by the Public Relations Society of America.

She has provided expert testimony regarding notification campaigns and conducted media audits of proposed notice programs for their adequacy under Fed R. Civ. P. 23(c)(2) and similar state class action statutes.

She has lectured, published and has been cited extensively on various aspects of legal noticing, product recall and crisis communications and has served the Consumer Product Safety Commission (CPSC) as an expert to determine ways in which the Commission can increase the effectiveness of its product recall campaigns.

Finegan has implemented many of the nation's largest and most high profile legal notice communication and advertising programs. In the course of her class action experience, Courts have recognized the merits of, and admitted expert testimony, based on, her scientific evaluation of the effectiveness of notice plans. She has designed legal notices for a wide range of class actions and consumer matters that include product liability, construction defect, anti-trust, medical/pharmaceutical, human rights, civil rights, telecommunication, media, environment, securities, banking, insurance, mass tort, restructuring and product recall.

.

Her most recent work includes:

In re: John's Manville (Statutory Direct Action Settlement, Common Law Direct Action and Hawaii Settlement) Index No 82-11656 (BRL) United States Bankruptcy Court Southern District of New York (2004). The nearly half-

billion dollar settlement constituted three separate notification programs, which targeted all persons, who had asbestos claims whether asserted or unasserted, against the Travelers Indemnity Company.

In the Findings of Fact and Conclusions of a Clarifying Order Approving the Settlements, the Honorable Chief Judge Burton R. Lifland said:

> ***"As demonstrated by Findings of Fact, the Statutory Direct Action Settlement notice program was reasonably calculated under all circumstances to apprise the affected individuals of the proceedings and actions taken involving their interests, Mullane v. Cent. Hanover Bank & Trust Co; 339 U.S. 306, 314 (1950), such program did apprise the overwhelming majority of potentially affected claimants and far exceeded the minimum notice required. The Court concludes that mailing direct notice via U.S. Mail to law firms and directly to potentially affected claimants, as well as undertaking an extensive print media and Internet campaign met and exceeded the requirements of due process. The Court's conclusion in this regard is buttressed by the results of over 26,000 phone calls, 20,000 requests for information 8,000 website visits and 4,000 users registered to download documents. The results simply speak for themselves."***

In re: Wilson v. Massachusetts Mutual Life Insurance Company, Case No. D-101-CV 98-02814 (First Judicial District Court County of Santa Fe, State of New Mexico 2002.) This was a nationwide notification program that included all persons in the United States who owned, or had owned, a life or disability insurance policy with Massachusetts Mutual Life Insurance Company and had paid additional charges when paying their premium on an installment basis. The class was estimated to exceed 1.6 million individuals. (www.insuranceclassclaims.com/).

In granting preliminary approval to the settlement agreement, the Honorable Art Encinias commented:

> ***"The Notice Plan was the best practicable and reasonably calculated, under the circumstances of the action. …[and] that the notice meets or exceeds all applicable requirements of law, including Rule 1-023(C)(2) and (3) and 1-023(E), NMRA 2001, and the requirements of federal and/or state constitutional due process and any other applicable law."***

In re: Deke, et al. v. Cardservice International, Case No. BC 271679 Superior Court of the State of California for the County of Los Angeles. (2004)

In the Final Order dated March 1, 2004, The Honorable Charles W. McCoy commented:

> ***"The Class Notice satisfied the requirements of California Rules of Court 1856 and 1859 and due process and constituted the best notice practicable under the circumstances."***

In re: Sager v. Inamed Corp. and McGhan Medical Breast Implant Litigation, Case No. 01043771, Superior Court of the State of California, County of Santa Barbara. (2004).

In the Final Judgment and Order, dated March 30, 2004, the Honorable Thomas P. Anderle stated:

> ***"Notice provided was the best practicable under the circumstances."***

In re: Florida Microsoft Antitrust Litigation Settlement. Index number 99-27340 CA 11, 11th Judicial District Court of Miami – Dade County, Florida. (2003)

In the Final Order Approving the Fairness of the Settlement, The Honorable Henry H. Harnage said:

> ***"The Class Notice … was the best notice practicable under the circumstances and fully satisfies the requirements of due process, the Florida Rules of Civil Procedure, and any other applicable rules of the Court."***

In re: Montana Microsoft Antitrust Litigation Settlement. No. DCV 2000 219, Montana First Judicial District Court – Lewis & Clark Co. (2003).

In re: South Dakota Microsoft Antitrust Litigation Settlement. Civ. No. 00-235, State of South Dakota County of Hughes in the Circuit Court Sixth Judicial Circuit.

In re: Kansas Microsoft Antitrust Litigation Settlement. Case No. 99C17089 Division No. 15 Consolidated Cases, District Court of Johnson County, Kansas Civil Court Department.

In the Final Order and Final Judgment, the Honorable Allen Slater stated**:**

> ***"The Class Notice provided was the best notice practicable under the circumstances and fully complied in all respects with the requirements of due process and of the Kansas State. Annot. §60-22.3."***

In re: North Carolina Microsoft Antitrust Litigation Settlement. No. 00-CvS-4073 (Wake) 00-CvS-1246 (Lincoln), State of North Carolina, Wake and

Lincoln Counties in the General Court of Justice, Superior Court Division, North Carolina Business Court.

In the multiple state cases, Plaintiffs generally allege that Microsoft unlawfully used anticompetitive means to maintain a monopoly in markets for certain software, and that as a result, it overcharged consumers who licensed its MS-DOS, Windows, Word, Excel and Office software. The multiple legal notice programs targeted both individual users and business users of this software. The scientifically designed notice programs took into consideration both media usage habits and demographic characteristics of the targeted class members.

In re: MCI Non-Subscriber RatePayers Litigation, MDL Docket No. 1275, (District Court for Southern District of Illinois 2001). The advertising and media notice program was designed with the understanding that the litigation affects all persons or entities who were customers of record for telephone lines presubscribed to MCI/World Com, and were charged the higher non-subscriber rates and surcharges for direct-dialed long distance calls placed on those lines. (www.rateclaims.com).

After a hearing to consider objections to the terms of the settlement, The Honorable David R. Herndon stated:

> ***"As further authorized by the Court, [Huntington Legal Advertising] … published the Court-approved summary form of notice in eight general-interest magazines distributed nationally; approximately 900 newspapers throughout the United States and a Puerto Rico newspaper. In addition, Huntington Legal Advertising caused the distribution of the Court-approved press release to over 2,500 news outlets throughout the United States… The manner in which notice was distributed was more than adequate…"***

In re: Sparks v. AT&T Corporation, Case No. 96-LM-983 (In the Third Judicial Circuit, Madison County, Illinois.) The litigation concerned all persons in the United States who leased certain AT&T telephones during the 1980's. Finegan implemented a nationwide media program designed to target all persons who may have leased telephones during this time period, a class that included a large percentage of the entire population of the United States.

In granting final approval to the settlement, the Court commented:

> ***"The Court further finds that the notice of the proposed settlement was sufficient and furnished Class Members with the information they needed to evaluate whether to participate in or opt out of the proposed settlement. The Court therefore concludes***

that the notice of the proposed settlement met all requirements required by law, including all Constitutional requirements."

In re: Pigford v. Glickman and U.S. Department of Agriculture, Case No. CA No. 97-19788 (PLF), (District Court for the District of Columbia 1999). This was the largest civil rights case to settle in the United States in over 40 years. The highly publicized, nation-wide paid media program was implemented to alert all present and past African-American farmers of the opportunity to recover monetary damages against the U.S. Department of Agriculture for alleged loan discrimination.

In his Opinion, the Honorable Paul L. Friedman commented on the notice program by saying:

"***The parties also exerted extraordinary efforts to reach class members through a massive advertising campaign in general and African American targeted publications and television stations."***

Judge Friedman continued:

"The Court concludes that class members have received more than adequate notice and have had sufficient opportunity to be heard on the fairness of the proposed Consent Decree."

In re: SmithKline Beecham Clinical Billing Litigation, Case No. CV. No. 97-L-1230 (Illinois Third Judicial District Madison County, 2001.) Finegan designed and developed a national media and Internet site notification program in connection with the settlement of a nationwide class action concerning billings for clinical laboratory testing services.

In re: MacGregor v. Schering-Plough Corp., Case No. EC248041 (Superior Court of the State of California in and for the County of Los Angeles 2001). This nationwide notification was designed to reach all persons who had purchased or used an aerosol inhaler manufactured by Schering-Plough. Because no mailing list was available, notice was accomplished entirely through the media program.

In re: Swiss Banks Holocaust Victim Asset Litigation Case No. CV-96-4849, (Eastern District of New York 1999). Finegan managed the implementation of the Internet site. The site was developed in 21 native languages. It is a highly secure data gathering tool and information hub, central to the global outreach program of Holocaust survivors. (www.swissbankclaims.com/).

In re: Louisiana-Pacific Inner-Seal Siding Litigation, Civil Action Nos. 879-JE, and 1453-JE U.S.D.C., (District of Oregon 1995 and 1999). Under the

terms of the Settlement, three separate Notice programs were to be implemented at three-year intervals over a period of six years. In the first Notice campaign, Finegan implemented the print advertising and Internet components of the Notice program. (www.lpsidingclaims.com/).

In approving the legal notice communication plan, the Honorable Robert E. Jones stated:

> ***"The notice given to the members of the Class fully and accurately informed the Class members of all material elements of the settlement…[through] a broad and extensive multi-media notice campaign."***

In reference to the third-year Notice program for Louisiana-Pacific, Special Master Hon. Judge Richard Unis, commented:

> ***"In approving the third year notification plan for the Louisiana-Pacific Inner-Seal™ Siding litigation, the court referred to the notice as '…well formulated to conform to the definition set by the Court as adequate and reasonable notice.'***
>
> ***Indeed, I believe the record should also reflect the Court's appreciation to Ms. Finegan for all the work she's done, ensuring that noticing was done correctly and professionally, while paying careful attention to overall costs." Her understanding of various notice requirements under Fed. R. Civ. P. 23, helped to insure that the notice given in this case was consistent with the highest standards of compliance with Rule 23(d)(2).***

In re: Thomas A. Foster and Linda E. Foster v. ABTco Siding Litigation. Case No. 95-151-M, (Circuit Court of Choctaw County, Alabama 2000). This litigation focused on past and present owners of structures sided with Abitibi-Price siding. The notice program that Finegan implemented was national in scope. (www.abitibiclaims.com/).

In the Order and Judgment Finally approving settlement, Judge J. Lee McPhearson said:

> ***"The Court finds that the Notice Program conducted by the Parties provided individual notice to all known Class Members and all Class Members who could be identified through reasonable efforts and constitutes the best notice practicable under the circumstances of this Action. This finding is based on the overwhelming evidence of the adequacy of the notice program …The media campaign involved broad national notice through television and print media, regional and local newspapers, and the Internet (see id. ¶¶9-11) The result: over 90***

percent of Abitibi and ABTco owners are estimated to have been reached by the direct media and direct mail campaign."

In re: Exxon Valdez Oil Spill Litigation, Case No. A89-095-CV (HRH) (Consolidated) U.S. District Court for the District of Alaska (1997, 2002). Finegan implemented two media campaigns to notify native Alaskan residents, trade workers, fisherman, and others impacted by the oil spill of the litigation and their rights under the settlement terms.

In re: Georgia-Pacific Toxic Explosion Litigation Case No. 98 CVC05-3535, (Court of Common Pleas Franklin County, Ohio 2001). Finegan implemented a regional notice program that included network affiliate television, radio and newspaper. The notice was designed to alert adults living near a Georgia-Pacific plant of their rights under the terms of the class action settlement. (www.georgia-pacificexplosionsettlement.com/).

In the Order and Judgement finally approving the settlement the Honorable Jennifer L. Bunner said:

"…Notice of the settlement to the Class was the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The Court finds that such effort exceeded even reasonable effort and that the Notice complies with the requirements of Civ. R. 23(C).

In re: Johns Manville Phenolic Foam Litigation Case No. CV 96-10069, (District Court for the District of Massachusetts 1999). The nationwide multi-media legal notice program was designed to reach all Persons who own any structure, including an industrial building, commercial building, school, condominium, apartment house, home, garage or other type of structure located in the United States or its territories, in which Johns Manville PFRI was installed, in whole or in part, on top of a metal roof deck. (www.pfriclaims.com/).

In re: James Hardie Roofing Litigation Case No. CV. No. 00-2-17945-65SEA (Superior Court of Washington in and for King County 2002). The nationwide legal notice program included advertising on television, in print and on the Internet. It was national in scope and designed to reach all persons who own any structure with JHBP roofing products. (www.hardieroofingclaims.com/).

In the Final Order and Judgement the Honorable Steven Scott stated:

> ***"The notice program required by the Preliminary Order has been fully carried out…. [and was] extensive. The notice provided fully and accurately informed the Class Members of all material elements of the proposed Settlement and their opportunity to participate in or be excluded from it; was the best notice practicable under the circumstances; was valid, due and sufficient notice to all Class Members; and complied fully with Civ. R. 23, the United States Constitution, due process, and other applicable law."***

In re: First Alert Smoke Alarm Litigation, Case No. CV-98-C-1546-W (UWC), (District Court for the Northern District of Alabama Western Division 2000). Finegan implemented a nationwide legal notice and public information program. The public information program is scheduled to run over a two-year period to inform those with smoke alarms of the performance characteristics between photoelectric and ionization detection. The media program includes network and cable television, magazine and specialty trade publications. (www.brksmokealarmsettlement.com/).

In the Findings and Order Preliminarily Certifying the Class, The Honorable C.W. Clemon wrote that the notice plan:

> ***"…Constitutes due, adequate and sufficient notice to all Class Members; and meets or exceeds all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Alabama State Constitution, the Rules of the Court, and any other applicable law."***

In re: American Cyanamid, Civil Action CV-97-0581-BH-M United States District Court for the Southern District of Alabama 2001. The media program targeted those Farmers who had purchased crop protection chemicals manufactured by American Cyanamid.

In the Final Order and Judgment, the Honorable Charles R. Butler Jr. wrote:

> ***"The Court finds that the form and method of notice used to notify the Temporary Settlement Class of the Settlement satisfied the requirements of Fed. R. Civ. P. 23 and due process, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all potential members of the Temporary Class Settlement."***

In re: Bristow v Fleetwood Enterprises Litigation Case No Civ 00-0082-S-EJL (District Court for the District of Idaho 2001). Finegan implemented a legal notice campaign targeting present and former employees of Fleetwood Enterprises, Inc., or its subsidiaries, who worked as hourly production workers at Fleetwood's housing, travel trailer, or motor home manufacturing plants. The comprehensive notice campaign included print, radio and television advertising.

In re: New Orleans Tank Car Leakage Fire Litigation, Case No 87-16374 Civil District Court for the Parish of Orleans, State of Louisiana. (2000). This case resulted in one of the largest settlements in US History. This campaign consisted of a media relations and paid advertising program to notify individuals of their rights under the terms of the settlement.

In re: Garria Spencer v. Shell Oil Company, Case No. CV 94-074, District Court, Harris County Texas. (1995). The nationwide notification program was designed to reach individuals who owned real property or structures in the United States which contained polybutylene plumbing with acetyl insert or metal insert fittings.

In re: Hurd Millwork Heat Mirror™ Litigation Case No. CV-772488, Superior Court of the State of California for the County of Santa Clara. (2000). This nationwide multi-media notice program was designed to reach class members with failed heat mirror seals on windows and doors, and alert them as to the actions that they needed to take to receive enhanced warranties or window and door replacement.

In re: Laborers District Counsel of Alabama Health and Welfare Fund v Clinical Laboratory Services, Inc, Case No. CV –97-C-629-W Northern District of Alabama. (2000). Finegan implemented a national media and Internet site notification program in connection with the settlement of a nationwide class action concerning alleged billing discrepancies for clinical laboratory testing services.

In re: StarLink Corn Products Liability Litigation Case No. 01 C 1181, Northern District of Illinois, Eastern Division (2002). Finegan implemented a nationwide notification program designed to alert potential class members of the terms of the settlement.

In re: Albertson's Back Pay Litigation, Case No. 97-0159-S-BLW, U.S. District Court of Idaho (1997). Finegan implemented a secure Internet site, where claimants could seek case information confidentially. (www.albsuits.com/).

In re: Georgia Pacific Hardboard Siding Recovering Program, Case No. CV-95-3330-RG, Circuit Court for the County of Mobile, State

of Alabama (1997). Finegan implemented a multi-media legal notice program, which was designed to reach class members with failed G-P siding and alert them of the pending matter. Notice was provided through advertisements which aired on national cable networks, magazines of nationwide distribution, local newspaper, press releases and trade magazines.

In re: Diet Drug Litigation, Finegan has worked on many state notification programs and worked as a consultant to the National Diet Drug Settlement Committee on notification issues.

In re: ABS II Pipes Litigation, Case No. 3126, Contra Costa Superior Court, State of California (1998 and 2001). The Court approved regional notification program designed to alert those individuals who owned structures with the pipe, that they were eligible to recover the cost of replacing the pipe. (www.abspipes.com/).

In re: Avenue A Inc. Internet Privacy Litigation
District Court for the Western District of Washington Case No: C00-1964C

In re: Lorazepam and Clorazepate Antitrust Litigation, MDL No. 1290 (TFH) United States District Court for the District of Columbia.

In re: Providian Financial Corporation ERISA Litigation Case No C-01-5027 United States District Court for the Northern District of California.

In re: H & R Block., et al Tax Refund Litigation State of Maryland Circuit Court for Baltimore City Case No. 97195023/CC4111

In re: American Premier Underwriters, Inc, U.S. Railroad Vest Corp.
Boone Circuit Court – Boone County, Indiana. Cause No: 06C01-9912

In re: Sprint Corporation Optical Fiber Litigation District Court of Leavenworth Co, Kansas Case No: 9907 CV 284

In re: Shelter Mutual Insurance Company Litigation District Court in and for Canadian Co. State of Oklahoma Case No. CJ-2002-263

In re: Conseco, Inc. Securities Litigation Southern District of Indiana Indianapolis Division Case No: IP-00-0585-C Y/S CA

In re: National Treasury Employees Union, et al United States Court of Federal Claims Case No: 02-128C

In re: City of Miami Parking Litigation Circuit Court of the 11th Judicial Circuit in and for Miami Dade County, Florida Case Nos: 99-21456 CA-10, 99-23765 – CA-10.

In re: Prime Co. Incorporated D/B/A/ Prime Co. Personal Communications, United States Court Eastern District of Texas Beaumont Division – Civil Action No. L 1:01CV658.

In re: Alsea Veneer v. State of Oregon A.A., Case No. 88C-11289-88C-11300.

Bankruptcy Experience --

Finegan has implemented literally hundreds of domestic and international bankruptcy notice programs. A sample case list includes the following:

In re: United Airlines, Case No. 02-B-48191 (Bnkr. N.D Illinois Eastern Division) Finegan worked with United and its restructuring attorneys to implement global legal notice programs. The notice was published in 11 countries and translated into 6 languages. Finegan worked closely with legal counsel and UAL's advertising team to select the appropriate media and to negotiate the most favorable advertising rates. (www.pd-ual.com/).

In re: Enron, Case No. 01-16034 (Bankr. S.D.N.Y.) Finegan worked with Enron and its restructuring attorneys to publish various legal notices.

In re: Dow Corning, Case No. 95-20512 (Bankr. E.D. Mich.) Finegan originally designed the information website. This Internet site is a major information hub that has various forms in 15 languages. (http://www.implantclaims.com/).

In re: Harnischfeger Industries, Case No. 99-2171 (RJW) Jointly Administered U.S. Bankr., District of Delaware. Finegan implemented 6 domestic and international notice programs for this case. The notice was translated into 14 different languages and published in 16 countries.

In re: Keene Corporation, Case No. 93B 46090 (SMB) U.S. Bankr. Eastern District of Missouri, Eastern Division. Finegan implemented multiple domestic bankruptcy notice programs including notice on the plan of reorganization directed to all creditors and all Class 4 asbestos-related claimants and counsel.

In re: Lamonts, Case No. 00-00045 U.S. Bankr. Western District of Washington. Finegan an implemented multiple bankruptcy notice programs.

In re: Monet Group Holdings, Case Nos. 00-1936 (MFW) U.S. Bankr. District of Delaware. Finegan implemented a bar date notice.

In re: Laclede Steel Company, Case No 98-53121-399 US Bankr. CT, Eastern District of MO, Eastern Division. Finegan implemented multiple bankruptcy notice programs.

In re: Columbia Gas Transmission Corporation, Case No. 91-804 Bankr., Southern District of New York; Finegan developed multiple nationwide legal notice notification programs for this case.

In re: U.S.H. Corporation of New York, et al., and (BRL) Bankr. Southern District of New York; she implemented a bar date advertising notification campaign.

In re: Best Products Co., Inc., Bankr. Case No. 96-35267-T, Eastern District of Virginia; she implemented a national legal notice program that included multiple advertising campaigns for notice of sale, bar date, disclosure and plan confirmation.

In re: Lodgian, Inc., et al – Southern District Court of New York Case No. 16345 (BRL) Factory Card Outlet – 99-685 (JCA), 99-686 (JCA) Health Services, Inc., et al – District Court of Delaware Case No. 00-389 (MFW).

In re: International Total Services, Inc., et at. – Eastern District Court of New York, Case No: 01-21812, 01-21818, 01-21820, 01-21882, 01-21824, 01-21826, 01-21827 (CD) Under Case No: 01-21812.

In re: Decora Industries, Inc and Decora, Incorporated. District of Delaware Case No: 00-4459 and 00-4460 (JJF).

In re: Genesis Health Ventures, Inc., et al - District of Delaware Case No. 00 2692 (PJW).

In re: Telephone Warehouse, Inc., et al – District of Delaware Case No. 00-2105 through 00-2110 (MFW).

In re: United Companies Financial Corporation, et al., District of Delaware Case No. 99-450 (MFW) through 99-461 (MFW).

In re: Caldor, Inc. New York, The Caldor Corporation, Caldor, Inc. CT, et al. Southern District of New York Case No: 95-B44080 (JLG).

In re: Physicians Health Corporation, et al. District of Delaware Case No: 00-

4482 (MFW).

In re: GC Companies., et al. District of Delaware Case Nos:00-3897 through 00-3927 (MFW).

***In re: Heilig-Meyers Company, et al*.** Eastern District of Virginia (Richmond Division) Case Nos: 00-34533 through 00-34538.

In re: Yes! Entertainment Corporation District of Delaware Case No: 99-373 (MFW).

In re: Wash Depot Holdings, Inc. et al District of Delaware Case No. 01-10571(SLR).

In re: Fine Host Corporation District of Delaware Case No. 99-20 (PJW).

In re: Lanxide Technology – District of Delaware Case No. 99C – 07-307 (SCD).

Background

Prior to establishing Capabiliti, Finegan co-founded Huntington Legal Advertising, a nationally recognized leader in legal notice communications. In 1997 Huntington Legal Advertising was purchased by Fleet Bank and Poorman-Douglas Corporation.

Prior to that, Finegan spearheaded Huntington Communications, (an Internet development company) and The Huntington Group, Inc., (a public relations firm). As a partner and consultant, she has worked on a wide variety of client marketing, research, advertising, public relations and Internet programs. During her tenure, client projects have included advertising (media planning and buying), shareholder meetings, direct mail, public relations (planning, financial communications) and community outreach programs. Her past client list includes large public and privately held companies: Code-A-Phone Corp., Thrifty-Payless Drug Stores, Hyster-Yale, The Portland Winter Hawks Hockey Team, U.S. National Bank, U.S. Trust Company, Morley Capital Management, Durametal Corporation and Bioject, Inc.

Prior to Huntington Advertising, Finegan worked as a consultant and public relations specialist for a West Coast-based Management and Public Relations Consulting firm.

Additionally, Finegan has experience in news and public affairs. Her professional background includes being a reporter, anchor and public affairs

director for KWJJ/KJIB radio in Portland, Oregon, as well as reporter covering state government for KBZY radio in Salem, Oregon. Finegan worked as a television program/promotion manager for KPDX directing $50 million in programming. Additionally, she was the program/promotion manager at KECH-22 television.

Finegan's multi-level communication background gives her a thorough, hands-on understanding of media, the communication process, and how it relates to creating effective and efficient legal notice campaigns.

Articles

Co-Author, "Approaches to Notice in State Court Class Actions," – For The Defense, Vol. 45, No. 11 -- November, 2003.

Citation – "Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior" U.S. Consumer Product Safety Commission, CPSC-F-02-1391, p.10, Heiden Associates – July 2003.

Author, "The Web Offers Near, Real-Time Cost Efficient Notice," – American Bankruptcy Institute - ABI Journal, Vol. XXII, No. 5. -- 2003.

Author, "Determining Adequate Notice in Rule 23 Actions," – For The Defense, Vol. 44, No. 9 -- September, 2002,

Author, Legal Notice, What You Need To Know and Why, - Monograph, July 2002.

Co-Author, "The Electronic Nature of Legal Noticing," - The American Bankruptcy Institute Journal -Vol. XXI, No. 3, April 2002.

Author, "Three Important Mantras for CEO's and Risk Managers in 2002" - International Risk Management Institute - irmi.com/ January 2002.

Author, "100 Million People are Talking…Your Settlement Might be the Next Hot Topic" - Bureau of National Affairs Class Action Litigation Reporter - Vol. 2, No. 16 August 24, 2001.

Co-Author, "Used the Bat Signal Lately" - The National Law Journal, Special Litigation Section - February 19, 2001.

Author, "How Much is Enough Notice" - Dispute Resolution Alert, Vol. 1, No. 6. March 2001.

Author, "Monitoring the Internet Buzz" – The Risk Report, Vol. XXIII, No. 5, Jan. 2001,

Author, "High-Profile Product Recalls Need More Than the Bat Signal" - International Risk Management Institute - irmi.com/ July 2001.

Co-Author, "Do you know what 100 million people are buzzing about today? Risk and Insurance Management – March 2001.

Quoted Article: "Keep Up with Class Action" Kentucky Courier Journal – March 13, 2000.

Author, "The Great Debate - How Much is Enough Legal Notice?" American Bar Association – Class Actions and Derivatives Suits Newsletter, Winter edition 1999.

Speaker/Expert Panelist Presenter

U.S. Consumer Product Safety Commission	Ms. Finegan participated as an Expert to the Consumer Product Safety Commission to discuss ways in which the CPSC could enhance and measure the recall process. As an expert panelist, Ms. Finegan discussed how the CPSC could better motivate consumers to take action on recalls and how companies could scientifically measure and defend their outreach efforts. Bethesda MD, September 2003.
Weil, Gotshal & Manges	CLE presentation " A Scientific Approach to Legal Notice Communication" New York, June 2003.
Sidley & Austin	CLE presentation "A Scientific Approach to Legal Notice Communication" Los Angeles, May 2003.
Kirkland & Ellis	Speaker to restructuring group addressing "The Best Practicable Methods to Give Notice in a Tort Bankruptcy." Chicago, April 2002.
American Bar Association –	How to Bullet-Proof Notice Programs and What Communication Barriers Present Due Process Concerns in Legal Notice. Presentation to the ABA Litigation Section Committee on Class Actions & Derivative Suits - Chicago, IL, August 6, 2001.
McCutchin, Doyle, Brown - & Enerson	Speaker to litigation group in San Francisco and broadcast to four other McCutchin locations, addressing the definition of effective notice and barriers to communication that affects due process in legal notice. San Francisco - June 2001.
Marylhurst University -	Guest lecturer on public relations research methods. Portland - February 2001.
University of Oregon -	Guest speaker to MBA candidates on quantitative and qualitative research for marketing and communications programs. Portland - May 2001.
Judicial Arbitration & Mediation Services (JAMS) -	Speaker on the definition of effective notice and barriers to communication that affects due process in legal notice. San Francisco and Los Angeles - June 2000.
International Risk Management Institute –	www.irmi.com/ Ongoing Expert Commentator on Litigation Communications.

American Bankruptcy Institute Journal (ABI) www.abi.org/ Contributing Editor – Beyond the Quill.

Memberships and Professional Credentials

APR, Accredited Public Relations by the Universal Board of Accreditation Public Relations Society of America.
Member of the Public Relations Society

II. Consent Decree signed by the Court Dated April 14, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, et al., Plaintiffs, v. DAN GLICKMAN, SECRETARY, THE UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	Civil Action No. 97-1978 (PLF)
CECIL BREWINGTON, et al., Plaintiffs, v. DANIEL R. GLICKMAN, Defendant.	Civil Action No. 98-1693 (PLF)

CONSENT DECREE

WHEREAS the parties desire to resolve amicably all the claims raised in these suits, including the plaintiffs' claims under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq.; and

WHEREAS the parties have agreed upon mutually satisfactory terms for the complete resolution of all the claims that have, or could have, been asserted by the plaintiffs in this litigation; and

WHEREAS, in light of the remedial purposes of this Consent Decree, the parties intend that it be liberally construed to

effectuate those purposes in a manner that is consistent with law; and

WHEREAS the parties have entered into this Consent Decree for the purpose of ensuring that in their dealings with USDA, all class members receive full and fair treatment that is the same as the treatment accorded to similarly situated white persons;

NOW THEREFORE, the plaintiffs and the defendant, Dan Glickman, Secretary of the United States Department of Agriculture ("USDA"), hereby consent to the entry of this decree with the following terms:

1. Definitions

The following terms shall have the following meanings for purposes of this Consent Decree.

(a) The term "adjudicator" shall mean (i) the person or persons who is/are assigned by the facilitator to undertake the initial review of, and where appropriate make recommended decision on Track A claims under ¶ 9, below; and (ii) JAMS-Endispute, Inc., which shall make the final decision in all Track A claims and resolve issues of tolling under ¶ 6, below.

(b) The term "arbitrator" shall mean Michael K. Lewis of ADR Associates, and the other person or persons selected by Mr. Lewis who meet qualifications agreed upon by the parties and by Mr. Lewis and whom Mr. Lewis assigns to decide Track B claims under ¶ 10, below.

(c) The term "claimant" shall mean any person who submits a claim package for relief under the terms of this Consent Decree.

(d) The term "claim package" shall mean the materials sent to claimants who request them in connection with submitting a claim for relief under the provisions of this Consent Decree. The claim package will include (i) a claim sheet and election form and a Track A Adjudication claim affidavit, copies of which are attached hereto as Exhibit A; and (ii) associated documentation and instructions.

(e) The term "class counsel" shall mean Alexander J. Pires, Jr. and Phillip L. Fraas, Lead Counsel for members of the class defined in ¶ 2(a), infra. In addition, the following counsel and law firms have been acting, and will continue to act, as Of Counsel in this case: J.L. Chestnut, of Chestnut, Sanders, Sanders & Pettaway, P.C., Selma, AL.; T. Roe Frazer of Langston, Frazer, Sweet & Freese, P.A., Jackson, MS.; Hubbard Saunders, IV, of The Terney Firm, Jackson, MS.; Othello Cross, of Cross, Kearney & McKissic, Pine Bluff, AR., Gerard Lear of Speiser Krause, Arlington, VA.; and William J. Smith, Fresno, CA.

(f) The term "credit" shall mean the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment or to purchase property or services and defer payment therefor.

(g) The term "defendant's counsel" shall mean the United States Department of Justice.

(h) The term "discrimination complaint" shall mean a communication from a class member directly to USDA, or to a member of Congress, the White House, or a state, local or federal

official who forwarded the class member's communication to USDA, asserting that USDA had discriminated against the class member on the basis of race in connection with a federal farm credit transaction or benefit application.

(i) The term "facilitator" shall mean the Poorman-Douglas Corporation, which shall receive claims pursuant to this Consent Decree and assign claims to adjudicators and arbitrators for final resolution. The parties may, by agreement and without the Court's approval, assign to the facilitator such additional tasks related to the implementation of this Consent Decree as they deem appropriate.

(j) The term "preponderance of the evidence" shall mean such relevant evidence as is necessary to prove that something is more likely true than not true.

(k) The term "priority consideration" means that an application will be given first priority in processing, and with respect to the availability of funds for the type of loan at issue among all similar applications filed at the same time; provided, however, that all applications to be given priority consideration will be of equal status.

(l) The term "substantial evidence" shall mean such relevant evidence as appears in the record before the adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion. Substantial evidence is a lower standard of proof than preponderance of the evidence.

(m) The term "USDA" shall include the United States Department of Agriculture and all of its agencies, instrumentalities, agents, officers, and employees, including, but not limited to the state and county committees which administer USDA credit programs, and their staffs.

(n) The term "USDA listening session" shall mean one of the meetings of farmers and USDA's representatives conducted by USDA's Civil Rights Action Team between January 6, 1997 and January 24, 1997.

2. Class Definition

(a) Pursuant to Fed. R. Civ. P. 23(b)(3) the Court hereby certifies a class defined as follows:

> All African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

(b) Any putative class member who does not wish to have his claims adjudicated through the procedure established by this Consent Decree may, pursuant to Federal Rule of Civil Procedure 23(c)(2), request to be excluded from the class. To be effective, the request must be in writing and filed with the facilitator within 120 days of the date on which this Consent Decree is entered.

3. Duties of Facilitator

(a) Poorman-Douglas Corporation shall serve as the facilitator and shall perform the following functions:

(i) publish the Notice of Class Settlement in the manner prescribed in ¶ 4, below;

(ii) mail claim packages to claimants who request them;

(iii) process completed claim packages as they are received;

(iv) determine, pursuant to the terms of this Consent Decree, which claimants satisfy the class definition as contained in ¶ 2(a);

(v) transmit to adjudicators claim packages submitted by claimants who contend that they are entitled to participate in the claims process due to equitable tolling of ECOA's statute of limitations under the particular circumstances of their claim;

(vi) transmit to the adjudicator the claims packages of class members with ECOA claims who elect to proceed under Track A;

(vii) transmit to the arbitrator the claims packages of class members with ECOA claims who elect to proceed under Track B;

(viii) transmit to the adjudicator the claims packages of class members who assert only non-credit benefit claims; and

(ix) maintain and operate a toll-free telephone number to provide information to interested persons about the procedure for filing claims under this Consent Decree.

(b) The facilitator's fees and expenses shall be paid by USDA.

4. Class Notice Procedure

(a) Within 10 days after the entry of the Order granting preliminary approval of this Consent Decree the facilitator shall mail a copy of the Notice of Class Certification and Proposed Class Settlement (a copy of which is attached hereto as Exhibit B) to all then-known members of the class.

(b) As soon as possible after entry of the Order granting preliminary approval of this Consent Decree the facilitator shall take the following steps:

(i) arrange to have 44 commercials announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing aired on the Black Entertainment Network, and 18 similar commercials on Cable News Network, during a two-week period;

(ii) arrange to have one-quarter page advertisements announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in 27 general circulation newspapers, and 115 African-American newspapers, in an 18-state region during a two-week period; and

(iii) arrange to have a full page advertisement announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in the editions of TV Guide that are distributed in an 18-state region, and a half page advertisement in the national edition of Jet Magazine.

(c) USDA shall use its best efforts to obtain the assistance of community based organizations, including those organizations that focus on African-American and/or agricultural issues, in

communicating to class members and potential class members the fact that the Court has preliminarily approved this Consent Decree and the time and place of the fairness hearing.

5. Class Membership Screening; Election by Claimant; Processing.

(a) The facilitator shall send claim packages to claimants who request them.

(b) To be eligible to obtain relief pursuant to this Consent Decree, a claimant must complete the claim sheet and return it and any supporting documentation to the facilitator. The claimant must also provide to the facilitator evidence, in the form described below, that he filed a discrimination complaint between January 1, 1981 and July 1, 1997:

(i) a copy of the discrimination complaint the claimant filed with USDA, or a copy of a USDA document referencing the discrimination complaint; or

(ii) a declaration executed pursuant to 28 U.S.C. § 1746 by a person who is not a member of the claimant's family and which (1) states that the declarant has first-hand knowledge that the claimant filed a discrimination complaint with USDA; and (2) describes the manner in which the discrimination complaint was filed; or

(iii) a copy of correspondence from the claimant to a member of Congress, the White House, or a state, local, or federal official averring that the claimant has been discriminated against, except that, in the event that USDA does not possess a copy of the correspondence, the claimant also shall be required to

submit a declaration executed pursuant to 28 U.S.C. § 1746 by the claimant stating that he sent the correspondence to the person to whom it was addressed; or

(iv) a declaration executed pursuant to 28 U.S.C. § 1746 by a non-familial witness stating that the witness has first-hand knowledge that, while attending a USDA listening session, or other meeting with a USDA official or officials, the claimant was explicitly told by a USDA official that the official would investigate that specific claimant's oral complaint of discrimination.

(c) In order to be eligible for relief under ¶¶ 9 or 10, below, a claimant must submit his completed claim package to the facilitator postmarked within 180 days of the date of entry of this Consent Decree, except that a claimant whose claim is otherwise timely shall have not less than 30 days to submit a declaration pursuant to subparagraph (b)(iii), above, after being directed to do so without regard to the 180-day period.

(d) At the time a claimant who asserts an ECOA claim submits his completed claim package, he must elect whether to proceed under Track A, see ¶ 9, below, or Track B see ¶ 10, below, except that claimants whose claims arise exclusively under non-credit benefit programs shall be required to proceed under Track A. A class member's election under this subparagraph shall be irrevocable and exclusive.

(e) Each completed claim package must be accompanied by a certification executed by an attorney stating that the attorney

has a good faith belief in the truth of the factual basis of the claim, and that the attorney has not and will not require the claimant to compensate the attorney for assisting him.

(f) Within 20 days of receiving a completed claim package the facilitator shall determine, pursuant to subparagraph (b), above, whether the claimant is a member of the class as defined by ¶ 2(a). If a claimant is determined to be a class member, the facilitator shall assign the class member a consent decree case number, refer the claim package to an adjudicator or an arbitrator, as appropriate, and send a copy of the entire claim package to the class counsel and defendant's counsel along with a notice that includes the class member's name, address, telephone number, social security number, consent decree case number, and that identifies the track under which the class member is proceeding. If a claimant is found not to be a class member, the facilitator shall notify the claimant and the parties' counsel of that finding.

(g) A claimant who satisfies the definition of the class in ¶ 2(a), above, but who fails to submit a completed claim package within 180 days of entry of this Consent Decree may petition the Court to permit him to nonetheless participate in the claims resolution procedures provided in ¶¶ 9 & 10, below. The Court shall grant such a petition only where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.

6. Tolling of ECOA's Statute of Limitations.

(a) In addition to the class defined herein, a person who otherwise satisfies the criteria for membership in the class defined in ¶ 2(a), above, but who did not file a discrimination complaint until after July 1, 1997, shall be entitled to relief under this Consent Decree by demonstrating, consistent with Irwin v. United States, 498 U.S. 89 (1990), that:

(i) he has actively pursued his judicial remedies by filing a defective pleading during the applicable statute of limitations period;

(ii) he was induced or tricked by USDA's misconduct into allowing the filing deadline for the applicable statute of limitations period to pass; or

(iii) he was prevented by other extraordinary circumstances beyond his control from filing a complaint in a timely manner, provided that excusable neglect shall not qualify as extraordinary circumstances.

(b) Within 10 days of a receiving a completed claim package from a person who did not file a discrimination claim until after July 1, 1997, the facilitator shall forward the claim to an adjudicator. The adjudicator shall then determine whether the claim is timely pursuant to subparagraphs (a)(i), (ii), or (iii), above. If the claim is found to be qualified under subparagraph (a), above, the adjudicator shall return the claim package to the facilitator, along with a written determination to that effect. The facilitator shall then process the claim pursuant to ¶ 5(f), above, and the claimant shall be eligible for the relief provided

herein for class members. If the claim is found by the adjudicator to be untimely, the adjudicator shall return the claim package to the facilitator with a written determination to that effect. The facilitator shall promptly notify the claimant of the adjudicator's decision.

7. Interim Administrative Relief

Upon being advised by the facilitator that a claimant satisfies the class definition in ¶ 2(a), above, or that a claimant has met the criteria for equitable tolling under ¶ 6, above, USDA shall immediately cease all efforts to dispose of any foreclosed real property formerly owned by such person. USDA also will refrain from foreclosing on real property owned by the claimant or accelerating the claimant's loan account; however, USDA may take such action up to but not including foreclosure or acceleration that is necessary to protect its interests. USDA may resume its efforts to dispose of any such real property after a final decision in USDA's favor on the class member's claim pursuant to ¶¶ 9 or 10, below.

8. Response by USDA to a Track A Referral Notice

In any Track A case USDA may, within 60 days after receipt of the materials and notice the facilitator is required, pursuant to ¶ 5(f), above, to furnish to USDA with respect to persons who are determined to be class members, provide to the adjudicator assigned to the claim, and to class counsel, any information or materials that are relevant to the issues of liability and/or damages.

9. Track A — Decision by Adjudicator

(a) In cases in which a class member asserts an ECOA violation and has elected to proceed under Track A:

(i) the adjudicator shall, within 30 days of receiving the material required to be submitted by the class member under ¶ 5, along with any material submitted by defendant pursuant to ¶ 8, above, determine on the basis of those materials whether the class member has demonstrated by substantial evidence that he was the victim of race discrimination. To satisfy this requirement, the class member must show that:

(A) he owned or leased, or attempted to own or lease, farm land;

(B) he applied for a specific credit transaction at a USDA county office during the period identified in ¶ 2(a), above;

(C) the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and

(D) USDA's treatment of the loan application led to economic damage to the class member.

(ii) The adjudicator's decision shall be in a format to be agreed upon by the class counsel and defendant's counsel, and shall include a statement of the reasons upon which the decision is based.

(iii) In any case in which the adjudicator decides in a class member's favor, the following relief shall be provided to the class member:

(A) USDA shall discharge all of the class member's outstanding debt to USDA that was incurred under, or affected by, the program(s) that was/were the subject of the ECOA claim(s) resolved in the class member's favor by the adjudicator. The discharge of such outstanding debt shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program;

(B) The class member shall receive a cash payment of $50,000 that shall be paid from the fund described in 31 U.S.C. § 1304 ("the Judgment Fund");

(C) an additional payment equal to 25% of the sum of the payment made under subparagraph (B), above, and the principal amount of the debt forgiven under subparagraph (A), above, shall be made by electronic means directly from the Judgment Fund to the Internal Revenue Service as partial payment of the taxes owed by the class member on the amounts paid or forgiven pursuant to those provisions;

(D) The injunctive relief made available pursuant to ¶ 11, below; and

(E) The immediate termination of any foreclosure proceedings that USDA has initiated against any of the class member's real property in connection with the ECOA claim(s) resolved in the class member's favor by the adjudicator; and the return of any

USDA inventory property that formerly was owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the adjudicator.

(iv) If the adjudicator determines that a class member's claim is not supported by substantial evidence, the class member shall receive no relief under this Consent Decree.

(v) The decision of the adjudicator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the adjudicator with respect to any claim that is, or could have been decided by the adjudicator.

(b) In cases in which a class member asserts only non-credit claims under a USDA benefit program:

(i) the adjudicator shall, within 30 days of receiving the material required to be submitted by the class member under ¶ 5, along with any material submitted by defendant pursuant to ¶ 8, above, determine on the basis of those materials whether the class member has demonstrated by substantial evidence that he was the victim of race discrimination. To satisfy this requirement, the class member must show that:

(A) he applied for a specific non-credit benefit program at a USDA county office during the period identified in ¶ 2(a), above; and

(B) his application was denied or approved for a lesser amount than requested, and that such treatment was different than the treatment received by specifically identified, similarly

situated white farmers who applied for the same non-credit benefit.

(ii) The adjudicator's decision shall be in a format to be agreed upon by the parties, and shall include a statement of the reasons upon which the decision is based.

(iii) In any case in which the adjudicator decides in a class member's favor, the following relief shall be provided to the class members:

(A) USDA shall pay to the class member the amount of the benefit wrongly denied, but only to the extent that funds that may lawfully be used for that purpose are then available; and

(B) The injunctive relief made available pursuant to ¶11(c)-(d), below.

(iv) If the adjudicator determines that a class member's claim is not supported by substantial evidence, the class member shall receive no relief under this Consent Decree.

(v) The decision of the adjudicator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the adjudicator with respect to any claim that is, or could have been decided by the adjudicator.

(c) The adjudicator's fees and expenses shall be paid by USDA.

10. Track B — Arbitration

(a) Within 10 days of receiving the completed claim package of a class member who has elected to proceed under Track B, the

arbitrator shall notify the class member and defendant of the date on which an evidentiary hearing on the class member's claim will be held. The hearing shall be scheduled for a date that is not less than 120 days, nor more than 150 days, from the date on which the hearing notice is sent.

(b) At least 90 days prior to the hearing described in subparagraph (a), above, USDA and the class member shall file with the arbitrator and serve on each other a list of the witnesses they intend to call at the hearing along with a statement describing in detail the testimony that each witness is expected to provide, and a copy of all exhibits that each side intends to introduce at such hearing. The parties shall be required to produce for a deposition, and for cross examination at the arbitration hearing, any person they identify as a witness pursuant to subparagraph (a), above.

(c) Each side shall be entitled to depose any person listed as a witness by his opponent pursuant to subparagraph (b), above.

(d) Discovery shall be completed not later than 45 days before the date of the hearing described in subparagraph (a), above.

(e) Not less than 21 days prior to commencement of the hearing described in subparagraph (a), above, each side shall (i) notify the other of the names of those witnesses whom they intend to cross-examine at the hearing; and (ii) file with the arbitrator memoranda addressing the legal and factual issues presented by the class member's claim.

(f) The hearing shall be conducted in accordance with the Federal Rules of Evidence. All direct testimony shall be introduced in writing and shall be filed with the arbitrator and served on the opposing side at least 30 days in advance of the hearing. The hearing shall be limited in duration to eight hours, with each side to have up to four hours within which to cross examine his opponent's witnesses, and to present his legal arguments.

(g) The arbitrator shall issue a written decision 30-60 days after the date of the hearing. If the arbitrator determines that the class member has demonstrated by a preponderance of the evidence that he was the victim of racial discrimination and that he suffered damages therefrom, the class member shall be provided the following relief:

(i) actual damages as provided by ECOA, 15 U.S.C. § 1691e(a) to be paid from the Judgment Fund;

(ii) USDA shall discharge all of the class member's outstanding debt to the Farm Service Agency that was incurred under, or affected by, the program(s) that were the subject of the claim(s) resolved in the class member's favor by the arbitrator. The discharge of such outstanding debt shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program;

(iii) The injunctive relief made available pursuant to ¶ 11, below; and

(iv) The immediate termination of any foreclosure proceedings that have been initiated against any of the class member's real property in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator, and the return of any USDA inventory property that was formerly owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator.

(h) If the arbitrator rules in the defendant's favor, the class member shall receive no relief under this Consent Decree.

(i) The decision of the arbitrator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the arbitrator with respect to any claim that is, or could have been decided, by the arbitrator.

(k). The arbitrator's fees and expenses shall be paid by USDA.

11. Class-Wide Injunctive Relief

(a) USDA will provide each class member who prevails under ¶¶ 9(a) or 10 with priority consideration, on a one-time basis, for the purchase, lease, or other acquisition of inventory property to the extent permitted by law. A class member must exercise his right to the relief provided in the preceding sentence in writing and within 5 years of the date this order.

(b) USDA will provide each class member who prevails under ¶¶ 9(a) or 10 with priority consideration for one direct farm ownership loan and one farm operating loan at any time up to five

years after the date of this Order. A class member must notify USDA in writing that he is exercising his right under this agreement to priority consideration in order to receive such consideration.

(c) Any application for a farm ownership or operating loan, or for inventory property submitted within five years of the date of this Consent Decree by any class member who prevails under ¶¶ 9 or 10, will be viewed in a light most favorable to the class member, and the amount and terms of any loan will be the most favorable permitted by law and USDA regulations. Nothing in the preceding sentence shall be construed to affect in any way the eligibility criteria for participation in any USDA loan program, except that outstanding debt discharged pursuant to ¶¶ 9(a)(iii)(A) or 10(g)(ii), above, shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program.

(d) In conjunction with any application for a farm ownership or operating loan or for inventory property submitted by a class member who prevails under ¶¶ 9 or 10, above, USDA shall, at the request of such class member provide the class member with reasonable technical assistance and service, including the assistance of qualified USDA employees who are acceptable to the class member, in connection with the class member's preparation and submission of any such application.

12. Monitor

(a) From a list of three persons submitted to it jointly by the parties, or, if after good faith negotiations they cannot agree, two persons submitted by plaintiffs and two persons submitted by defendant, the Court shall appoint an independent Monitor who shall report directly to the Secretary of Agriculture. The Monitor shall remain in existence for a period of 5 years and shall not be removed except upon good cause. The Monitor's fees and expenses shall be paid by USDA.

(b) The Monitor shall:

(i) Make periodic written reports (not less than every six months) to the Court, the Secretary, class counsel, and defendant's counsel on the good faith implementation of this Consent Decree;

(ii) Attempt to resolve any problems that any class member may have with respect to any aspect of this Consent Decree;

(iii) Direct the facilitator, adjudicator, or arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

(iv) Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any consent decree complaints and to expedite their resolution.

(c) If the Monitor is unable within 30 days to resolve a problem brought to his attention pursuant to subparagraph (ii), above, he may file a report with the parties' counsel who may, in

turn, seek enforcement of this Consent Decree pursuant to ¶ 13, below.

13. Enforcement Procedures

Before seeking any order by the Court concerning the alleged violation of any provision of this Consent Decree, the parties must comply with the following procedures:

(a) The person seeking enforcement of a provision of this Consent Decree shall serve on his opponent a written notice that describes with particularity the term(s) of the Consent Decree that are alleged to have been violated, the specific errors or omissions upon which the alleged violation is based, and the corrective action sought. The person alleging the violation shall not inform the Court of his allegation at that time.

(b) The parties shall make their best efforts to resolve the matter in dispute without the Court's involvement. If requested to do so, the movant shall provide to his opponent any information and materials available to the movant that support the violation alleged in the notice.

(c) The person who served the notice of violation pursuant to subparagraph (a), above, may not move for enforcement of this Consent Decree until at least 45 days after the date on which he served the notice.

14. Attorney's Fees

(a) Class counsel (for themselves and all Of-Counsel) shall be entitled to reasonable attorney's fees and costs under ECOA, 15 U.S.C. § 1691e(d), and to reasonable attorney's fees, costs, and

expenses under the APA, 28 U.S.C. § 2412(d) (as appropriate), that are generated in connection with the filing of this action and the implementation of this Consent Decree. Defendant reserves the right to challenge any and all aspects of class counsel's application for fees, costs, and/or expenses.

(b) Recognizing the fees, costs, and/or expenses already incurred, and given the anticipated fees, costs, and/or expenses to be incurred by class counsel in the implementation of this Consent Decree, defendant will make a one-time payment to class counsel of $1,000,000 as a credit toward class counsel's application for attorney's fees, costs, and/or expenses. The payment shall be made to class counsel and of counsel (payable to Alexander J. Pires, Jr. and Phillip L. Fraas) within 20 days of the date on which this Consent Decree is entered by the Court. This one-time payment shall be credited against any ultimate award or negotiated settlement of fees, costs, and expenses, and to the extent any such ultimate award or settlement is less than this one-time payment, class counsel shall refund to defendant the entire amount by which this one-time payment exceeds the award or settlement amount.

(c) The provision of attorney's fees, costs, and/or expenses in this Consent Decree is by agreement of the parties and shall not be cited a precedent in any other case.

15. Parties' Respective Responsibilities

No party to this Consent Decree is responsible for the performance, actions, or obligations of any other party to this Consent Decree.

16. Fairness Hearing

(a) Upon the parties' execution of this Consent Decree, the parties shall transmit the Decree to the Court for preliminary approval; request that the Court schedule a fairness hearing on the Consent Decree; and request that the Court, upon issuance of an order granting preliminary approval of this Decree, issue an order setting aside the dates currently scheduled for trial and staying this litigation.

(b) Within 5 days of the execution of this Consent Decree by class counsel and defendant's counsel, the Notice of Class settlement provided for in ¶ 4, above, containing, inter alia, a notice of the fairness hearing on this Consent Decree shall be sent to all known, potential members of the class. The fairness hearing will be held at 10:00 AM on March 2, 1999, in Courtroom 20 of the E. Barrett Pettyman United States Courthouse at 3rd St. and Constitution Ave., N.W., Washington, D.C. Any objections to the entry of this Consent Decree shall be filed not later than February 15, 1999.

17. Final Judgment

If, after the fairness hearing, the Court approves this Consent Decree as fair, reasonable, and adequate, a Final Judgment, the entry of which shall be a condition precedent to any obligation of any party under this Consent Decree, shall be

entered dismissing with prejudice, pursuant to the terms of this Consent Decree and Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, all claims in the litigation.

18. Releases

As provided by the ordinary standards governing the preclusive effects of consent decrees entered in class actions, all members of the class who do not opt out of this Consent Decree pursuant to ¶ 2(b), above, and their heirs, administrators, successors, or assigns (together, the "Releasors"), hereby release and forever discharge the defendant and his administrators or successors, and any department, agency, or establishment of the defendant, and any officers, employees, agents, or successors of any such department, agency, or establishment (together, the "Releasees") from -- and are hereby themselves forever barred and precluded from prosecuting -- any and all claims and/or causes of action which have been asserted in the Seventh Amended Complaint, or could have been asserted in that complaint at the time it was filed, on behalf of this class, by reason of, or with respect to, or in connection with, or which arise out of, any matters alleged in the complaint which the Releasors, or any of them, have against the Releasees, or any of them. It also is expressly understood that any class-wide claims of race-based discrimination in USDA's credit programs by members of the class defined in ¶ 2(a), above are barred unless the operative facts giving rise thereto did not occur prior to the entry of this Decree.

19. Defendant's Duty Consistent With Law and Regulations

Nothing contained in this Consent Decree or in the Final Judgment shall impose on the defendant any duty, obligation or requirement, the performance of which would be inconsistent with federal statutes or federal regulations in effect at the time of such performance.

20. No Admission of Liability

Neither this Consent Decree nor any order approving this Consent Decree is or shall be construed as an admission by the defendant of the truth of any allegation or the validity of any claim asserted in the complaint, or of the defendant's liability therefor, nor as a concession or an admission of any fault or omission of any act or failure to act, or of any statement, written document, or report heretofore issued, filed or made by the defendant, nor shall this Consent Decree nor any confidential papers related hereto and created for settlement purposes only, nor any of the terms of either, be offered or received as evidence of discrimination in any civil, criminal, or administrative action or proceeding, nor shall they be construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing on the part of the defendant, nor as an admission by any party to this Consent Decree that the consideration to be given hereunder represents the relief which could be recovered after trial. However, nothing herein shall be construed to preclude the use of this Consent Decree in order to effectuate the consummation, enforcement, or modification of its terms.

21. No Effect if Default

Subject to the terms of ¶ 17, above, and following entry by the Court of Final Judgment, no default by any person or party to this Consent Decree in the performance of any of the covenants or obligations under this Consent Decree, or any judgment or order entered in connection therewith, shall affect the dismissal of the complaint, the preclusion of prosecution of actions, the discharge and release of the defendant, or the judgment entered approving these provisions. Nothing in the preceding sentence shall be construed to affect the Court's jurisdiction to enforce the Consent Decree on a motion for contempt filed in accordance with ¶ 13.

22. Effect of Consent Decree if Not Approved

This Consent Decree shall not become binding if it fails to be approved by the Court or if for any reason it is rendered ineffective in any judicial proceeding before initially taking effect. Should it fail to become binding, this Consent Decree shall become null and void and shall have no further force and effect, except for the obligations of the parties under this paragraph. Further, in that event: this Consent Decree; all negotiations in connection herewith; all internal, private discussions among the Department of Justice and/or USDA conducted in furtherance of the settlement process to determine the advisability of approving this Consent Decree; and all statements made by the parties at, or submitted to the Court during, the fairness hearing shall be without prejudice to any person or party

to this Consent Decree, and shall not be deemed or construed to be an admission by any party to this Consent Decree of any fact, matter, or proposition.

23. Entire Terms of Agreement

The terms of this Consent Decree constitute the entire agreement of the parties, and no statement, remark, agreement, or understanding, oral or written, which is not contained herein, shall be recognized or enforced.

24. Authority of Class Counsel

Class counsel who are signatories hereto hereby represent, warrant, and guarantee that such counsel are duly authorized to execute this Consent Decree on behalf of the plaintiffs, the members of the plaintiff class, and all Of-Counsel for the plaintiffs.

25. Duty to Defend Decree

The parties to this Consent Decree shall employ their best efforts to defend this Consent Decree against any challenges to this Consent Decree, in any forum.

ALEXANDER J. PIRES, Jr.

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SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 4/14/99

III. Affidavit Dated February 19, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY PIGFORD, *et al.*, Plaintiffs, v. DAN GLICKMAN, Secretary, United States Department of Agriculture, Defendant.	)	Civil Action N. 97-19788 (PLF)
	)	Declaration of Jeanne C. Finegan

I, Jeanne C. Finegan, attest:

1. My name is Jeanne C. Finegan. I am Director of Huntington Legal Advertising, an advertising and media-consulting firm in Beaverton, Oregon which specializes in the design and implementation of Class Action and Bankruptcy media notification campaigns.

2. This declaration is based upon my personal knowledge and upon information provided by associates or staff under my supervision. It is a post analysis of the communications plan. The information is of a type reasonably relied upon in the fields of advertising, media and communications.

3. I have over 15 years of experience in the field of communications, including 11 years as Director/President of Huntington Legal Advertising, one of the largest dedicated legal advertising agencies in the country. During my tenure at this firm, I have coordinated advertising notification programs for large-scale chapter 11 and class action cases including:

> **In re: Louisiana-Pacific Inner-Seal Siding Litigation**, Civil Action Nos. 879-JE, and 1453JE U.S.D.C., District of Oregon, (1995).A multi-million dollar print advertising /Internet notification program designed to alert consumers about the settlement (http://www.lpsidingclaims.com/).
>
> **In re: Georgia Pacific Hardboard Siding Recovering Program,** Case No. CV-95-3330-rg, Circuit Court for the County of Mobile, State of Alabama (1997). Both this and the Louisiana-Pacific notification program were designed to reach class members with the failed siding and alert them to the actions that they needed to take to recover damages. (http://www.gpclaims.com/).

In re: Garria Spencer v. Shell Oil Company, Case No. CV 94-074, District Court, Harris County Texas (1995) a $2.4 million print advertising notification program designed to reach individuals who owned real property or structures in the United States which contained polybutylene plumbing with acetyl insert or metal insert fittings.

ABS II Pipes Litigation, Case No. 3126, Contra Costa Superior Court, State of California (1998). A regional notification designed to alert those who owned structures with the pipe, that they were eligible for recovery on the cost of replacing the pipe. (http://www.abspipes.com/)

In re: Alsea Veneer v. State of Oregon A.A., Case No 88C-11289-88C-11300, (1996). This statewide notification program included coupon response and 24-hour 800-information.

Some of my Bankruptcy legal notice experience includes:

In re: Columbia Gas Transmission Corporation, Case No. 91-804 Bankr., Southern District of New York; a $1 million dollar bar date advertising notification program.

In re: U.S.H. Corporation of New York, et al., and (BRL) Bankr. Southern District of New York; a $250,000 bar date advertising notification campaign.

In re: Best Products Co., Inc: Bankr. Case No. 96-35267-T, Eastern District Of Virginia; a national legal notice program that included multiple advertising campaigns for notice of sale, bar date, disclosure and plan confirmation.

In re: Dow Corning, Case No. 95-20512 (Bankr. E.D. Mich.); design and implementation of an Internet notification program. (http://www.implantclaims.com/)

4. I designed the legal notice program set forth herein, that was implemented by Huntington Legal Advertising and its parent company, Poorman-Douglas Corp.

5. Poorman-Douglas and Huntington Legal Advertising had responsibility for overall management and coordination of this program.

6. Poorman-Douglas (P-D) is a firm with more than 27 years of experience in claims processing. P-D's class action case administration services include coordination of all notice requirements; design of direct-mail notice; establishment of 800 phone line and fulfillment services; receipt and processing of opt-outs; coordination with the U.S. Postal Service; database management; and preparation of affidavits.

8. I understand that Pigford v Glickman is on behalf of a nation-wide class that includes African American farmers from states including, but not limited to, Alabama, Arkansas, California, Florida, Georgia, Illinois, Kansas, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia. The suit alleges that the Department of Agriculture ("USDA") willfully discriminated against these African American farmers when they applied for various farm programs, and that when they filed complaints of discrimination with the USDA, the USDA failed to properly investigate those complaints.

9. I understand that the class is defined as:

> "All African-American farmers who (1) farmed between January 1, 1983, and February 21, 1997; and (2) applied, during that time period, for participation in a federal farm program with USDA, and as a direct result of a determination by USDA in response to said application, believed that they were discriminated against on the basis of race, and subsequently filed a written discrimination complaint with USDA." Pigford v. Glickman, Order dated 10/09/98, Hon. Paul L. Friedman, U.S. District Court Judge.

10. I further understand the court certified three sub-classes pursuant to Rule 23(c) (4) of the Federal Rules of Civil Procedure: (1) "African-American farmers, who have a file with Defendant, but did not receive a written determination from Defendant in response to their discrimination complaint;" (2) "African-American farmers, who have a file with Defendant, who received a written determination from Defendant in response to their discrimination complaint but who maintain that the written determination from Defendant was not reached in accordance with law;" and (3) "African-American farmers, who do not have a file with Defendant because their discrimination complaints were destroyed, lost or thrown away by Defendant."

11. Based on the Poorman-Douglas/Huntington Advertising team's experience and research reasonably relied upon in the fields of advertising, media and communications, this program was designed to generate attention from those African-American farmers who have been discriminated against by the Department of Agriculture, and alert them to the opportunity to participate in the lawsuit. Details of the program are set forth in greater detail in subsequent paragraphs.

12. The focus of the notification program was to provide targeted national, regional and local notice through the use of paid media vehicles. The program took into account certain demographics of potential class members including ethnicity, occupation and geographical distribution of plaintiffs. The program also considered the psychographic characteristics of this class as defined by MediaMark Research[1]. The psychographic analysis revealed the most appropriate media that reached the highest number of potential class members in the most cost-efficient manner.

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[1] MediaMark Research, Inc. is a nationally syndicated source which surveys the demographics, product usage, and media exposure of all persons aged 18 and over in the United States.

13. The communication program outlined in this declaration commenced the week of January 18, 1999 and was substantially completed by January 30, 1999. Consistent with our experience, the format for legal notification consisted of three types:

1) comprehensive, long-form notice;
2) summary notice, containing essential elements of the long-form notice; and
3) short form notice, a display ad, the principal purpose being to call attention to the lawsuit.

14. The notice program set forth herein utilized cable television networks, magazines, and newspapers.

15. **Paid Advertising** - One two-week flight[2] of broadcast ads aired on CNN, and the Black Entertainment Network. Print ads appeared once in the national edition of Jet Magazine and regional editions of TV Guide; and once in general circulation newspapers and newspapers targeted at African-American readership. **See Exhibit 1.**

In order to create a highly targeted, cost-efficient proposal, the notification program was segmented into primary and secondary notification regions. The primary area of media focus was on the top seven states where the largest population of African-American Farmers resides, plus the three states, Alabama, Arkansas and Virginia, where approximately 190 named plaintiffs reside. Nationwide, a blanket of paid media coverage ensured additional notification. This blanket consisted of CNN and the Black Entertainment Network, Jet and regional editions of TV Guide. The primary region utilized the top three general circulation newspapers within each state. Additionally, 100[3] African-American newspapers were added as a supplement in all 16 states. The secondary region encompasses all other states. Notification in the secondary region mirrors the primary region with the exception of utilizing only the highest general circulation newspaper in each state.

(a) **Print notification program** - Huntington Legal Advertising published a "short-form" notice (an "abbreviated notice with all the salient points of the case"). Attached to this affidavit (**See Exhibit 2**) is the short-form. The size of the notice varies depending on the format of the respective publication.

The short-form appeared as a display ad, and its principal purpose was to encourage potential class members to seek further information through an 800 number and mailing address. The information was be sufficiently simple and comprehensive for class members to understand the pending litigation and their rights. It was sufficiently motivational to encourage potential class members to

[2] Flight - the period of time over which a campaign runs.

[3] This number differs slightly from the originally planned 115 African-American newspapers. The discrepancy is due to certain advertising policies whereby a certain newspaper declines to run a legal notice of this nature, or the respective publications are no longer conducting business.

seek further, more detailed information from the above mentioned sources. **See Exhibit 3** for newspaper and magazine affidavits and tear sheet detail.

Short-form notices have been utilized in a number of well-publicized cases including Louisiana-Pacific Inner Seal Siding, DuPont Polybutelene Pipe, Avis Discrimination Litigation and many others. The value of short-form notices are twofold: the ads are easy to understand because they are written in lay-terms, and they are typically shorter than the full-notice, which makes them more cost-efficient.

Print ads appeared once in the national edition of Jet and regional editions of TV Guide. These publications were selected based on their reach[4] and readership among this target group. Individually these publications are quite strong. Jet reaches 40.56 percent of this target group, with TV Guide reaching 48.25 percent.

In calculating the overall performance of each publication, performance formulas eliminate readership, listenership and viewership duplication. Therefore, it is not possible to simply add up the following percentages and calculate an average reach. Additionally these publications have high circulation and pass-along factors[5]. Combined, it is estimated that these magazines had the potential to reach some 5,123,414 households, and specifically some 86,000 African-American farm operators, managers or others in farm-related industries.

(b) Broadcast - We produced a 15-second and 30-second television advertisement, as a voice-over with a copy role. The ad was designed to attract the attention of potential class members. The use of 15- and 30-second spots helped to conserve budget, while increasing the frequency of the message. The commercial described the case and what actions potential claimants should undertake. The 800-number appeared at the bottom of the ad for the duration of the commercial; a copy of the approved script is included. (**See Exhibit 4**). A copy of the toll-free 800 telephone call inquiries as of February 17, 1999 is also included. (**See Exhibit 5).**

c) Cable Television - A combination of 15-second and 30-second television commercials were targeted to air on CNN, and Black Entertainment Television. We purchased approximately 18 commercials on CNN. (26, :30's and 12, :15's) which aired in various dayparts[6] such as early news and daytime, fringe and

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[4] Reach is the number or percent of a potential audience exposed to an advertisement, commercial, or special vehicle within a given period. Source: MediaMark Research 12/2/98.

[5] Both newspapers and magazines have a "pass-along" factor. This represents the total number of readers in addition to the subscriber who review a given publication. Pass-along factors vary among publications. Media Mark research indicates that the pass-along for newspapers is 2.75, for Jet 9.98, Ebony is 6.94, TV Guide is 2.88.

[6] A daypart is a time segment into which a broadcast day is divided – by audience composition and/or broadcast origination time, (e.g., for television: morning news/daytime/early fringe/early news/prime access/prime time/late news and late fringe. For radio: morning drive, mid-day, afternoon, afternoon drive, etc.)

primetime programming. VHS copies of the ads are included. (**See Exhibit 6 – Box 1).** We purchased 44 commercials on Black Entertainment. In total, one third of the total number of commercials will be 15-second commercials; two-thirds of the schedule will consist of 30-second commercials. Over two weeks we aired a total of 62 commercials across two cable networks. Some 50 percent of the schedule ran in prime time and 50 percent of the schedule ran in other, well-viewed, dayparts.

Program Evaluation and Analysis - A traditional way for advertisers to assess the potential outreach of paid advertising is through a "reach and frequency" analysis of plan performance. Calculations are based upon the number of ads, audited circulation figures of newspapers and magazines in which the advertisement appears, and the potential audience delivery of the broadcast or cable program purchased.

Analyses of plan performance is based on standard media evaluation tools and research provided by traditionally accepted media evaluation sources, such as MediaMark Research and AC Neilsen.

Program Analysis – On average this notice plan reached 87 percent of African-American farm operators, managers or others in farm-related industries, an average frequency[7] of 2.4 times. The analysis is based on the psychographic tendencies of this target demographic group to watch or read various media. This notice plan reached a total of 8,635,050 newspaper households. The combined circulation for the selected magazines in this plan reached 5,123,414 households. The ad campaign resulted in 13,418 telephone calls, as of February 17, 1999.

For this campaign, newspaper achieved 23,746,387 adult gross impressions. Magazine created 9,227,767 adult gross impressions.

For this campaign, cable television reached nearly 18,495,000 television households nationwide. The purchased schedule on CNN created 11,449,000 adult gross impressions[8], and Black Entertainment Television created 7,788,000 adult gross impressions.

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access/prime time/late news and late fringe. For radio: morning drive, mid-day, afternoon, afternoon drive, etc.)

[7] Average Frequency is the number of times the average household or person is exposed to an advertising schedule within a specific period of time. Independent studies conducted by Hubert Zielske, "Remembering and Forgetting of Advertising," - Journal of Marketing 23 (March 1959) 239-43, and Leon Jakobovits, "Semantic Satiation and Cognitive Dynamics," American Psychological Association meeting paper, September 1966, concur that unless an individual is exposed often enough within a short enough interval, there is little point in reaching him/her at all. The clustering of ad messages over a short period of time increases recollection. The optimum frequency of exposures for gaining attention and learning a message is about three.

[8] Adult Gross Impressions are the number of those who might have had the opportunity to be exposed to a story that has appeared in the media. In print the term "impression or "opportunity to see" usually refers to the total audited

16 **Summary** - Based on my experience in designing and implementing legal notice programs in civil action suits, I believe that the notification campaign detailed in this declaration was strong resulting in some 15,132 telephone calls as of this date. I believe that the program resulted in broad-scale notification to potential class members of this case.

Dated: February 19, 1999

JEANNE C. FINEGAN

circulation of a publication. For example one article in a newspaper might be said to generate 1.5 million impressions or opportunities to see the story. Two articles would generate 3 million impressions, and so on.

Exhibit List

Exhibit 1 Print detail

African-American Newspaper detail includes
- *Circulation*
- *Date of publication*
- *Location by state*

General Circulation Newspaper detail includes
- *Circulation*
- *Date of publication*
- *Location by state*

Magazine detail includes
- *Circulation in targeted states*
- *Date of publication*
- *Readership totals*

Exhibit 2 Short Form Display Ad

Exhibit 3 Publication affidavits and tear sheets *(box1)

Exhibit 4 Broadcast scripts for 15- and 30-second commercials

Exhibit 5 800 Toll-Free Caller information

Exhibit 6 VHS copy of ads *(box 1)

Exhibit 7 Broadcast Schedules
- *CNN*
- *Black Entertainment Television*

Exhibit 1

African –American Newspapers

Huntington Legal Advertising
H
African American Newspaper Publication Report

STATE/PUBLICATION	AFFIDAVIT	TEARSHEET	RUN DATE	CIRCULATION
ALABAMA				
The Birmingham Times	X	X	1/21/99	21,500
Greene County Democrat	X	X	1/20/99	3,500
Mobile Beacon and Alabama Citizen	X	X	1/23/99 & 1/30/99	7,000
Speakin' Out News	X	X	1/20/99	21,000
The Tuskegee News	X	X	1/21/99	5,800
The Western Star	X	X	1/20/99	7,000
ARKANSAS				
Arkansas Tribune	X	X	1/21/99	5,000
CALIFORNIA				
The Black Voice News	X	X	1/21/99	7,500
California Advocate	X	X	1/29/99	25,000
LA Watts Times	X	X	1/21/99	25,500
Los Angeles Scoop	X	X	1/21/99	100,000
Los Angeles Sentinel	X	X	1/21/99	28,000
The Pasadena/San Gabriel Valley Journal	X	X	1/21/99	12,000
Sacramento Observer	X	X	WEEK OF 1/21	49,090
The San Diego Voice & Viewpoint	X	X	1/21/99	
San Francisco Bay View	X	X	1/20/99	
DELAWARE				
none	*	*	*	
DISTRICT OF COLUMBIA				
Capital Spotlight Newspaper	X	X	1/21/99	50,000
News Dimensions	X		1/22/99	25,000
Washington Afro-American	X	X	1/23/99	40,000
The Washington Informer	X	X	1/21/99	27,000
Washington New Observer	X	X	1/23/99	20,000
Washington Sun	X	X	1/21/99	45,000
FLORIDA				
The Bulletin	X	X	1/22/99	18,525
Central Florida Advocate	X	X	1/22/99	30,000
Community Voice	X	X	1/21/99	12,000
Daytona Times	X	X	1/21/99	15,000
Florida Sentinel Bulletin	X	X	1/22/99	21,600
The Florida Star	X	X	1/21/99	10,000
Jacksonville Advocate	X	X	1/18/99	31,624
Jacksonville Free Press	X	X	1/21/99	38,000
New American Press	X	X	1/21/99	34,000
Northeast Florida Advocate	X	X	1/21/99	38,000
The Orlando Times	X	X	1/21/99	10,000
The Palm Beach Gazette	X	X	1/21/99	3,000
The Pensacola Voice	X	X	1/21/99	36,250

Huntington Legal Advertising
H
African American Newspaper Publication Report

The Pompano Ledger	X	X	1/21/99	22,000
Tallahassee Capital Outlook	X	X	WEEK OF 1/21	12,000
The Weekly Challenger	X	X	1/23/99	36,000
Westside Gazette	X	X	1/21/99	35,000
GEORGIA				
The Atlanta Bulletin	X	X	1/23/99	50,000
Atlanta Daily World	X	X	1/28 - 1/29	16,000
The Atlanta Inquirer	X	X	1/30/99	60,000
The Atlanta News Leader	Confirmed/Tearsheet Pending		1/19/99	10,000
Atlanta Voice	X	X	1/21/99	133,000
Augusta Focus	X	X	1/21/99	22,000
The Champion	X	X	1/21/99	17,000
The Columbus Times	X	X	WEEK OF 1/20	20,056
The Herald	X		1/20/99	8,500
The Macon Courier	X	X	1/20/99	17,100
The Metro Courier	X	X	1/20/99	23,660
Savannah Tribune/Fort Valley Herald	X	X	1/20/99	8,000
KENTUCKY				
Louisville Defender	X	X	1/21/99	2,833
LOUISIANA				
Alexandria News Weekly	Confirmed/Tearsheet Pending		1/21/99	13,750
Baton Rouge Weekly Press	X	X	1/21/99	7,500
The Drum	X	X	WEEK OF 1/20	4,000
The Louisiana Weekly	X	X	WEEK OF 1/18	9,060
Monroe Dispatch	X	X	1/21/99	12,500
Monroe Free Press	X	X	1/21/99	14,000
New Orleans Data News Weekly	X	X	1/16/99	20,000
Shreveport Sun	X	X	1/21/99	7,000
MARYLAND				
Baltimore Times	X	X	1/22/99	32,000
The Dundalk Eagle	X	X	1/21/99	26,000
The Prince George's Post	X	X	1/21/99	10,000
Baltimore Afro-American	X	X	WEEK OF 1/23	
Every Wednesday	X	X	1/27/99	40,000
MISSISSIPPI				
Jackson Advocate	X	X	1/21/99	26,000
Mississippi Memo Digest	X	X	1/20/99	3,000
NORTH CAROLINA				
Carolina Peacemaker	X	X	1/21/99	8,000
The Carolina Times	X	X	1/23/99	5,800
The Carolinian	X	X	1/21/99	17,700
Challenger	X	X	1/21/99	5,000
The Charlotte Post	X	X	1/21/99	10,743
The Fayetteville Press	X	X	1/25/99	7,000

Huntington Legal Advertising
H
African American Newspaper Publication Report

Iredell County News	X	X	1/21/99	2,500
Wilmington Journal	X	X	1/21/99	8,600
Winston-Salem Chronicle	X	X	1/21/99	10,000
OKLAHOMA				
The Black Chronicle	X	X	1/21/99	28,803
The Oklahoma Eagle	X	X	1/21/99	15,000
SOUTH CAROLINA				
Black News	X	X	1/20/99	45,722
Carolina Panorama	X	X	1/22/99	16,000
Charleston Chronicle	X	X	1/20/99	6,000
The News	X	X	1/27/99	5,000
TENNESSEE				
Nashville Pride	X	X	1/22/99	35,000
Tri-State Defender	X	X	WEEK OF 1/23	25,600
TEXAS				
Dallas Post Tribune	X	X	1/21/99	18,500
The Dallas Weekly	X	X	1/26/99	20,300
Houston Defender	X	X	1/24/99	40,000
Houston Style	X	X	1/13 - 1/19	45,000
The Informer and Texas Freeman	X	X	1/22/99	30,000
San Antonio Informer	X	X	1/21/99	4,000
San Antonio Register	X	X	1/21/99	7,800
Snap News	X	X	1/23/99	10,000
Southwest Digest	X	X	1/21/99	27,000
The Villager	X	X	1/22/99	6,000
VIRGINIA				
The Metro Herald	Confirmed/Tearsheet Pending		1/22/99	35,000
New Journal & Guide	X		1/20/99	25,000
Richmond Free Press	X	X	1/21 - 1/23	25,000
The Richmond Voice	X	X	1/27/99	44,000
Roanoke Tribune	X	X	1/21/99	5,500
West Virginia Beacon Digest				
West Virginia Beacon Digest	X	X	1/20/99	35,000

TOTAL CIRCUALTION **2,171,416**

AFFIDAVITS AND TEAR SHEETS ARE ATTACHED

General Circulation Newspapers

HUNTINGTON LEGAL ADVERTISING
General Circulation Newspapers

State	Newspaper	Circulation	Pub. Date
Alabama	Birmingham News, Post-Herald	178,812	1/21/99
Arkansas	Arkansas Democrat Gazette	174,722	1/21/99
California	Los Angeles Times	1,095,007	1/21/99
Florida	The Miami Herald	367,029	1/21/99
Georgia	Atlanta Journal & Constitution	444,921	1/21/99
	Augusta Chronicle	74,671	1/21/99
	Macon Telegraph	70,644	1/21/99
Connecticut	Hartford Courant	216,292	1/21/99
Illinois	Chicago Tribune	672,999	1/21/99
Kansas	Wichita Eagle	93,441	1/21/99
Louisiana	New Orleans Times-Picayune	262,123	1/21/99
Mississippi	Clarion-Ledger	108,173	1/21/99
	Sun Herald	49,464	1/21/99
	NE Mississippi Journal	38,091	1/21/99
Missouri	St. Louis Post Dispatch	316,265	1/21/99
N. Carolina	Charlotte Observer	245,829	1/21/99
	Raleigh News & Observer	161,920	1/21/99
	Winston Salem Journal	90,523	1/21/99
S. Carolina	Columbia State	123,412	1/21/99
	Charleston Post & Courier	112,535	1/21/99
	Greenville News	98,950	1/21/99
Tennessee	Nashville Tennessean	195,974	1/21/99
	Memphis Commercial Appeal	171,442	1/21/99
	Knoxville News-Sentinel	117,948	1/21/99
Texas	Houston Chronicle	553,387	1/21/99
Virginia	Richmond Times Dispatch	210,160	1/21/99
TOTAL CIRCULATION		**6,244,734**	
TOTAL READERSHIP/GROSS IMPRESSIONS		17,173,018	

Magazines

Huntington Legal Advertising

H

TV Guide Regional Circulation Detail

Publication	Geographical Distribution	Circulation	*Readership
TV Guide	**Alabama**		
	Northern	91,000	
	Southern	35,000	
	Gulf Coast	45,000	
	Arkansas		
	State Edition	33,000	
	California		
	California N	191,000	
	Fresno	35,000	
	Los Angeles	700,000	
	San Francisco	400,000	
	Santa Barbara	74,000	
	Bakersfield	32,000	
	San Diego	230,000	
	Washington		
	D.C/Baltimore/		
	Delaware/		
	Maryland Edition	415,000	
	Florida		
	Northern	37,000	
	Southern	141,000	
	Orlando	99,000	
	Tampa-Sarasota	127,000	
	Georgia		
	Atlanta	220,000	
	Georgia-Southern	33,000	
	Kentucky		
	State Edition	73,000	

Huntington Legal Advertising

H

TV Guide Regional Circulation Detail

Louisiana		
	State Edition	72,000
	New Orleans	35,000
Mississippi		
	Central Edition	22,000
	Southern Edition	22,000
North Carolina		
	Eastern	102,000
	Charlotte	94,000
Oklahoma		
	Tulsa	27,000
	Oklahoma City	60,000
South Carolina		
	State Edition	61,000
Tennessee		
	Nashville	90,000
	Knoxville/Chattanoga	38,000
Texas		
	San Antonio	18,000
	Shreveport/Texarkana	42,000
	North Edition	43,000
	South Edition	32,000
	West	29,000
	Dallas/Ft. Worth	100,000
	Houston	98,000
Virginia		
	Central	39,000
	Eastern	88,000
West Virginia		
	State Edition	77,000

Total Regional TV Guide Circulation	**4,200,000**	
Total Regional Reader's for TV Guide		**12,096,000**

Huntington Legal Advertising

H

TV Guide Regional Circulation Detail

**Readership or pass along factor: Magazines have multiple readers per copy. This is called a pass-along factor. TV Guide's pass-along is 2.75 per copy. This number is results in a readership total.*

Huntington Legal Advertising

H

Jet Magazine Regional Circulation Detail and National Circulation/ Readership Totals

Publication	Geographical Distribution	Circulation	*Readership
Jet Magazine	Alabama State Edition	30,906	
	Arkansas	9,466	
	California	77,187	
	Delaware	4,499	
	District of Columbia	16,377	
	Florida	44,183	
	Georgia	58,918	
	Kentucky	9,486	
	Louisiana	25,508	
	Maryland	46,608	
	Mississippi	21,356	
	South Carolina	26,838	

Huntington Legal Advertising

H

Jet Magazine Regional Circulation Detail and National Circulation/ Readership Totals

North Carolian	51,753
Oklahoma	8,326
Tennessee	27,755
Texas	57,045
Virginia	41,264
West Virginia	2,185

Total Jet Circulation for States of Focus	**516,211**	**5,151,785**
Total National Jet Circulation	923,414	**9,215,671**

**Readership or pass along factor: Magazines have multiple readers per copy. This is called a pass-along factor. Jet's pass-along is 9.98 per copy. This number is results in a readership total.*

**The National Edition of Jet was purchased for this notification program.

Exhibit 2

ATTENTION

All past or present African American Farmers, your rights may be affected by a nationwide class action lawsuit. You may be entitled to compensation and damages.

You may be a potential class member if you farmed or attempted to farm between January 1, 1981 and December 31, 1996, and applied to the United States Department of Agriculture (USDA) for participation in a federal farm credit or benefit program and believe that you were discriminated against based on race. Settlement of the lawsuit has been preliminarily approved by the Court.

The Deadline to Opt-Out of the Class is 120 days from date of final approval of settlement.
The Deadline to file a claim is 180 days from date of final approval of settlement.
The Hearing before the Court for final approval is March 2, 1999.

If you wish to obtain more information about this case, obtain a claim package, or obtain a form to opt-out, call toll free:

1-800-646-2873

DO NOT CONTACT THE COURT OR CLERK'S OFFICE FOR INFORMATION

Exhibit 3

Exhibit 4

Farmers Litigation

:30 Second Cable Television Spot

:15 Second Cable Television Spot

1. Fade up copy roll over blue screen.

Split lower Screen
Super and hold

1-800-646-2873

If you are African American and farmed or attempted to farm between 1981 and 1996 the following announcement may apply to you.

If you applied to the U.S. Department of Agriculture for a farm credit or benefit program ....and believe that you were discriminated against based on race, you may be entitled to compensation and damages.

For more information please call toll free **1-800-646-2873.**

Farmers Litigation:
:15 Second Cable Television Spot

1. Fade up copy roll over blue screen.

Super split screen and hold

1-800-646-2873

If you are an African American and farmed between 1981 and 1996, your rights may be affected by a nationwide class action lawsuit against the U.S. Department of Agriculture.

For information call,

1-800-646-2873

2. Supers: fade out /fade copy roll

Exhibit 5

Daily Report

Poorman-Douglas Date: 02/17/99 Time: 15:54:44

Days: 12/19/98 .. 02/16/99

ACD-DN	DAY	HRS AVAIL	TOTAL ACD CALLS	AVG ACD TALK TIME	TOTAL NOT READY TIME	AVG WAIT TIME	TOTAL OUT CALLS	ACD CALLS XFERD	NET OUT BND CLS	AVG OUT DN TIME	TOTAL STAFF TIME	ANSR SRVS RATE
		HH:MM		MM:SS	HH:MM	MM:SS				SEC	HH:MM	
6671	01/05/99	0:02	2	0:05	0:10	0:29	2	0	2	40	0:13	100
	01/06/99	34:37	144	2:54	2:15	8:43	40	1	39	121	36:52	96
	01/07/99	57:45	509	2:47	7:22	2:12	30	1	29	77	65:07	93
	01/08/99	55:36	543	2:39	9:02	1:47	75	4	71	77	64:38	82
	01/11/99	54:49	669	2:41	6:26	1:03	90	4	86	66	61:15	70
	01/12/99	49:11	464	3:02	9:53	1:24	51	8	43	58	59:04	79
	01/13/99	53:36	401	3:31	7:18	1:49	65	7	58	83	60:54	86
	01/14/99	56:24	343	3:22	4:44	3:04	38	6	32	77	61:08	95
	01/15/99	54:09	282	3:20	5:30	4:06	75	2	73	60	59:38	91
	01/18/99	58:22	194	2:52	3:02	7:23	38	0	38	87	61:24	97
	01/19/99	63:30	436	3:27	8:17	2:31	77	3	74	61	71:47	88
	01/20/99	57:22	444	2:51	5:22	2:30	44	3	41	50	62:44	86
	01/21/99	48:04	540	2:30	5:12	1:49	57	13	44	86	53:15	97
	01/22/99	45:13	371	2:59	10:11	2:13	47	12	35	71	55:24	92
	01/25/99	63:22	842	2:43	8:23	0:33	46	7	39	71	71:45	69
	01/26/99	58:09	693	2:15	16:39	1:07	32	3	29	70	74:48	94
	01/27/99	46:03	581	2:34	8:09	1:02	32	2	30	55	54:12	93
	01/28/99	52:53	638	2:15	6:36	1:27	27	4	23	53	59:29	96
	01/29/99	45:39	510	2:32	10:40	1:06	28	2	26	86	56:19	94
	02/01/99	62:29	585	3:15	10:05	0:43	46	3	43	71	72:34	90
	02/02/99	54:23	388	3:05	9:58	1:23	41	4	37	107	64:20	91
	02/03/99	52:38	372	3:26	7:20	1:30	34	0	34	81	59:58	85
	02/04/99	55:32	389	3:09	4:49	1:53	25	1	24	85	60:21	92
	02/05/99	51:35	318	3:00	4:42	1:41	23	2	21	52	56:17	93
	02/07/99	0:00	0	0:00	0:01	0:00	0	0	0	0	0:01	0
	02/08/99	38:57	531	2:45	8:24	0:43	27	2	25	86	47:20	59
	02/09/99	34:50	402	2:56	6:05	1:45	19	1	18	57	40:55	83
	02/10/99	35:50	330	2:55	3:10	1:53	23	1	22	67	38:59	80
	02/11/99	39:40	290	2:36	2:27	3:31	14	0	14	90	42:07	95
	02/12/99	49:50	298	2:55	5:03	4:57	51	0	51	77	54:52	93
	02/13/99	24:00	0	0:00	0:00	*****	0	0	0	0	24:00	0
	02/14/99	24:00	0	0:00	0:00	*****	0	0	0	0	24:00	0
	02/15/99	62:41	418	2:52	5:43	4:49	20	1	19	116	68:24	87
	02/16/99	48:15	491	2:52	3:56	1:57	31	1	30	126	52:12	82
6671		1589:25	13418	2:51	206:52	2:11	1248	98	1150	76	1796:16	86
		1589:25	13418	2:51	206:52	2:11	1248	98	1150	76	1796:16	86

Exhibit 6

Exhibit 7

T BILLING ADDRESS

P. O. BOX 79440
BALTIMORE, MARYLAND 21279-0440

Black Entertainment Television
ONE BET PLAZA
1900 W Place, N.E.
Washington, D.C. 20018
(202) 608-2000

124

INVOICE NUMBER	DATE	PAGE
16559801	1-31-99	1

RATE CARD	BROADCAST MONTH	AGENCY
96	JANUARY STD	YES

AYMENT TO
CK ENTERTAINMENT
BOX 79440
TIMORE, MD 21279

REPRESENTATIVE	PRODUCT	CONTRACT END DATE	
LOS	AFRICAN AMERICAN FAR	1-29-99	
ADVERTISER	**SALESPERSON NUMBER**	**CONTRACT NUMBER**	**CUSTOMER NUMBER**
CLASS ACTION NOTIFIC	KLE 5005	165598	001142

ULE | **ACTUAL BROADCAST** | **RECONCILIATION**

DATE	END DATE	M T W T F S S RO	TIME PERIOD	PLAN	RATE	NO.	DATES	DAY	LENGTH	TIME	M/G FOR	AGENCY COPY NUMBER/DESCRIPTION	AMOUNT	REMARKS	DR/CR
JO	CE BI	LLING DATES: 01/18/99-01/29/99													
18	1-29	ROTATING	111A-230P	CA			1-22	FR	15	114P		AFRICAN AMERICAN FARME			
						2	1-25	MO	15	1229P		AFRICAN AMERICAN FARME			
				JAM	ZONE										
18	1-29	ROTATING	330-430P	CA			1-18	MO	30	357P		AFRICAN AMERICAN FARME			
							1-20	WE	30	422P		AFRICAN AMERICAN FARME			
							1-27	WE	30	427P		AFRICAN AMERICAN FARME			
						4	1-29	FR	30	411P		AFRICAN AMERICAN FARME			
				HIT	LIST										
25	1-29	ROTATING	1330-430P	CA		1	1-26	TU	15	347P		AFRICAN AMERICAN FARME			
				HIT	LIST										
18	1-29	ROTATING	1630P-7P	CA			1-20	WE	30	656P		AFRICAN AMERICAN FARME			
						2	1-26	TU	30	633P		AFRICAN AMERICAN FARME			
				COMEDY	ROTATOR										
18	1-29	ROTATING	1630P-7P	CA			1-18	MO	15	658P		AFRICAN AMERICAN FARME			
						2	1-29	FR	15	658P		AFRICAN AMERICAN FARME			
				COMEDY	ROTATOR										
18	1-29	ROTATING	18-9P	CA			1-20	WE	30	828P		AFRICAN AMERICAN FARME			
						2	1-28	TH	30	841P		AFRICAN AMERICAN FARME			
				HIT	LIST										
25	1-29	ROTATING	18-9P	CA		1	1-25	MO	15	818P		AFRICAN AMERICAN FARME			
				HIT	LIST										
18	1-29	ROTATING	1930-10P	CA			1-20	WE	30	955P		AFRICAN AMERICAN FARME			
						2	1-25	MO	30	943P		AFRICAN AMERICAN FARME			

TINUED NEXT PAGE

HLY COST CONFIRMATION

rrant that the actual broadcast information shown on this invoice was
rom the program log and will be available, on request, for inspection by
ser or agency for at least 12 months.

ORIGINAL

ACTUAL GROSS BILLING	SUB-TOTAL
AGENCY COMMISSION	TOTAL RECONCILING ITEMS
NET DUE AMOUNT	

Y BILLING ADDRESS

P. O. BOX 79440
BALTIMORE, MARYLAND 21279-0440

Black Entertainment Television
ONE BET PLAZA
1900 W Place, N.E.
Washington, D.C. 20018
(202) 608-2000

AYMENT TO
CK ENTERTAINMENT
BOX 79440
TIMORE, MD 21279

INVOICE NUMBER	DATE	PAGE
16560901	1-31-99	1

RATE CARD	BROADCAST MONTH	AGENCY
128 96	JANUARY STD	YES

REPRESENTATIVE	PRODUCT	CONTRACT END DATE	
LOS	AFRICAN AMERICAN FAR	1-29-99	

ADVERTISER	SALESPERSON NUMBER	CONTRACT NUMBER	CUSTOMER NUMBER
CLASS ACTION NOTIFIC	KLE 5005	165609	001142

VOICE BILLING DATES: 01/18/99-01/29/99

DATE	END DATE	M T W T F S S	RO	TIME PERIOD	PLAN	RATE	NO.	DATES	DAY	LENGTH	TIME	M/G FOR	AGENCY COPY NUMBER/DESCRIPTION	AMOUNT	REMARKS	DR/CR
18	1-29	ROTATING	1	11A-230P	CA			1-20	WE	30	1256P		AFRICAN AMERICAN FARME			
							2	1-26	TU	30	208P		AFRICAN AMERICAN FARME			
					JAM ZONE											
18	1-29	ROTATING	1	11P-12M	CA			1-19	TU	15	1123P		AFRICAN AMERICAN FARME			
							2	1-25	MO	15	1147P		AFRICAN AMERICAN FARME			
					BET TONIGHT											
18	1-29	ROTATING	1	12-1230M	CA			1-18	MO	15	1228A		AFRICAN AMERICAN FARME			
							2	1-27	WE	15	1215A		AFRICAN AMERICAN FARME			
					SPARKS											
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INVOICE NUMBER	DATE	PAGE
16559801	1-31-99	2

RATE CARD	BROADCAST MONTH	AGENCY
96	JANUARY STD	YES

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BOX 79440
TIMORE, MD 21279

REPRESENTATIVE	PRODUCT	CONTRACT END DATE	
LOS	AFRICAN AMERICAN FAR	1-29-99	
ADVERTISER	**SALESPERSON NUMBER**	**CONTRACT NUMBER**	**CUSTOMER NUMBER**
CLASS ACTION NOTIFIC	KLE 5005	165598	001142

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DATE	END DATE	M T W T F S S RO	TIME PERIOD	PLAN	RATE	NO.	DATES	DAY	LENGTH	TIME	M/G FOR	AGENCY COPY NUMBER/DESCRIPTION	AMOUNT	REMARKS	DR/CR
25	1-29	ROTATING	1930-10P	GOOD NEWS CA		1	1-27	WE	15	954P		AFRICAN AMERICAN FARME			
25	1-29	ROTATING	210P-11P	GOOD NEWS CA			1-26	TU	30	1037P		AFRICAN AMERICAN FARME			
						2	1-27	WE	30	1037P		AFRICAN AMERICAN FARME			
25	1-29	ROTATING	110P-11P	COMICVIEW CA		1	1-26	TU	15	1022P		CLASS ACTION			
18	1-29	ROTATING	211P-12M	COMICVIEW CA			1-19	TU	30	1109P		AFRICAN AMERICAN FARME			
							1-21	TH	30	1155P		AFRICAN AMERICAN FARME			
							1-25	MO	30	1124P		AFRICAN AMERICAN FARME			
						4	1-28	TH	30	1128P		AFRICAN AMERICAN FARME			
25	1-29	ROTATING	111P-12M	BET TONIGHT CA		1	1-27	WE	15	1154P		AFRICAN AMERICAN FARME			
18	1-29	ROTATING	112-1230M	BET TONIGHT CA			1-22	FR	30	1212A		AFRICAN AMERICAN FARME			
						2	1-28	TH	30	1225A		AFRICAN AMERICAN FARME			
18	1-29	ROTATING	112-1230M	SPARKS CA			1-19	TU	15	1215A		AFRICAN AMERICAN FARME			
						2	1-25	MO	15	1248A		AFRICAN AMERICAN FARME			
18	1-22	ROTATING	111A-230P	SPARKS CA		1	1-21	TH	30	1138A		AFRICAN AMERICAN FARME			
25	1-29	ROTATING	11A-2A	JAM ZONE CA			1-26	TU	15	139A		AFRICAN AMERICAN FARME			

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INVOICE NUMBER	DATE	PAGE
16559801	1-31-99	

RATE CARD	BROADCAST MONTH	AGENCY
96	JANUARY	STD YES

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REPRESENTATIVE	PRODUCT	CONTRACT END DATE	
LOS	AFRICAN AMERICAN FAR	1-29-99	
ADVERTISER	**SALESPERSON NUMBER**	**CONTRACT NUMBER**	**CUSTOMER NUMBER**
CLASS ACTION NOTIFIC	KLE 5005	165598	001142

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				MIDNIGHT LOVE											
1-18	1-24	ROTATING	12M-3M	CA		1	1-20	WE	30	228A		AFRICAN AMERICAN FARME			
				COMICVIEW											
1-25	1-29	ROTATING	12M-3M	CA		1	1-26	TU	15	244A		AFRICAN AMERICAN FARME			
				COMICVIEW											
1-23	1-23	1	8-9P	CA		1	1-23	SA	30	833P		AFRICAN AMERICAN FARME			
				BET SUUNDSTAGE											
1-24	1-24	2	9A-10A	CA			1-24	SU	30	921A		AFRICAN AMERICAN FARME			
						2	1-24	SU	30	939A		AFRICAN AMERICAN FARME			
				BOBBY JONES		GOSPEL									
1-18	1-29	1 1	930-10P	CA			1-19	TU	15	959P		AFRICAN AMERICAN FARME			
							1-21	TH	15	957P		AFRICAN AMERICAN FARME			
							1-26	TU	15	933P		AFRICAN AMERICAN FARME			
						4	1-28	TH	15	959P		AFRICAN AMERICAN FARME			
				THEA											
1-18	1-29	ROTATING	9-930P	CA			1-18	MO	15	904P		AFRICAN AMERICAN FARME			
						2	1-27	WE	15	926P		AFRICAN AMERICAN FARME			
				SPARKS											
1-18	1-24	ROTATING	210P-11P	CA			1-18	MO	15	1052P		AFRICAN AMERICAN FARME			
						2	1-22	FR	15	1014P		AFRICAN AMERICAN FARME			
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ADVERTISER	**PRODUCT**
AFRICAN AMERICAN FAR 4238	AFRICAN AMER FARMERS

CNN DATE 01/31/99

ORDER TYPE 5	AGENCY EST. NO. 2088004
INVOICE NO. 1382-153906 / PAGE 1	BROADCAST MONTH JANUARY, 1999
SCHEDULE DATES 01/18/99-01/31/99	CONTRACT YEAR
BILLING INSTRUCTIONS	

SCHEDULE					ACTUAL BROADCAST									RECONCILIATION		
1 DAYS	2 TIME	3 RATE DETAIL	4 RATE	5 NO THIS MO	6 DATES	7 DAY	8 TIME	9 TYPE	10 CLASS	11 P/B	12 M/G FOR	13 PRODUCT/FILM NO.	14 RATE	15 REMARKS	16 DR.	17 CR.
1-F	600P- 630P	AS			1/26	T	618P	15	AS			FARMERSLIT15				
LINE# 19	WORLDVIEW 6-630P			2	1/28	TH	613P	15	AS			FARMERSLIT15				
1-F	1200N-1230P	AE			1/18	M	1226P	15	AE			FARMERSLIT15				
LINE# 5	NEWSDAY 12N			2	1/29	F	1228P	15	AE			FARMERSLIT15				
1-F	900A-1000A	AC														
LINE# 3	MORNING NEWS 9A			1	1/27	W	916A	30	AC			FARMERSLIT30				
1-F	1000A-1130A	AD														
LINE# 4	MORNING NEWS 9A			1	1/21	TH	1043A	30	AD			FARMERSLIT30				
1-F	300P- 400P	AG														
LINE# 7	TALK BACK LIVE 3			1	1/25	M	---	--	---			- - - - - -		SPECIAL NEWS CO		
1-SU	500A- 530A	AA												VERAGE		
LINE# 1	CNNI NEWS 5A			1	1/22	F	511A	15	AA			FARMERSLIT15				
-SU	500A- 530A	AB														
LINE# 2	CNNI NEWS 5A			1	1/26	T	520A	30	AB			FARMERSLIT30				
-F	800P- 900P	AI														
LINE# 9	493 8-9P WORLD TODAY			1	1/18	M	852P	30	AI			FARMERSLIT30				
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LINE# 14	SAT MORNING 8A			1	1/23	SA	815A	30	AN			FARMERSLIT30				
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LINE# 20	SUN MORNING 8A			1	1/31	SU	843A	30	AT			FARMERSLIT30				
U	1000P-1100P	AQ														
LINE# 17	CNN & TIME SU 10			1	1/24	SU	1021P	30	AQ			FARMERSLIT30				

MONTHLY COST PER ORDER CONFIRMATION

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SUB-TOTALS

TOTAL RECONCILING ITEMS

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REPRESENTATIVE	SALESMAN
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ADVERTISER	**PRODUCT**
AFRICAN AMERICAN FAR 4238	A/AFRICAN AMER FARME

CNN DATE 01/31/99

ORDER TYPE	AGENCY EST. NO.
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INVOICE NO. 1382-154072 / PAGE 1	BROADCAST MONTH JANUARY, 1999
SCHEDULE DATES 01/18/99-01/29/99	CONTRACT YEAR
BILLING INSTRUCTIONS	

SCHEDULE					ACTUAL BROADCAST									RECONCILIATION		
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M-F LINE# 7	1000A-1130A MORNING NEWS	AG 9A	N/C	1	1/25	M	1051A	15	AG			FARMERSLIT15	N/C			
M-F LINE# 3	300P- 400P TALK BACK	AC LIVE 3	N/C	1	1/20	W	---	--	---			- - - - - -	--N/C	SPECIAL NEWS COVERAGE		
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M-F LINE# 4	900P-1000P LARRY KING	AD LIVE	N/C	1	1/22	F	948P	15	AD			FARMERSLIT15	N/C			
M-F LINE# 6	100P- 230P CNN TODAY	AF -230P	N/C	1	1/28	TH	115P	15	AF			FARMERSLIT15	N/C			

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ADVERTISER	**PRODUCT**
AFRICAN AMERICAN FAR 4238	AFRICAN AMER FARMERS

CNN DATE 01/31/9

ORDER TYPE	AGENCY EST. NO
5	2088004
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SCHEDULE DATES 01/18/99-01/31/99	CONTRACT YEAR

BILLING INSTRUCTIONS

SCHEDULE					ACTUAL BROADCAST									RECONCILIATION		
1 DAYS	2 TIME	3 RATE DETAIL	4 RATE	5 NO THIS MO	6 DATES	7 DAY	8 TIME	9 TYPE	10 CLASS	11 P/B	12 M/G FOR	13 PRODUCT/FILM NO.	14 RATE	15 REMARKS	16 DR.	17 CR.
-F	1200M- 100A	AK			1/20	W	1252A	15	AK			FARMERSLIT15				
LINE# 11	LARRY KING	RPLY		2	1/28	TH	1208A	15	AK			FARMERSLIT15				
	1000P-1100P	AL														
LINE# 12	CNN & TIME	10P		1	1/25	M	1038P	30	AL			FARMERSLIT30				
-F	900P-1000P	AJ														
LINE# 10	LARRY KING	LIVE			1/18	M	916P	15	AJ			FARMERSLIT15				
				2	1/27	W	948P	15	AJ			FARMERSLIT15				
-F	100P- 230P	AR			1/19	T	---	--	---			- - - - - -				
LINE# 18	CNN TODAY	-230P		2	1/29	F	216P	15	AR			FARMERSLIT15		SPECIAL NEWS COVERAGE		
J	200P- 300P	AP														
LINE# 16	WORLD REPORT			1	1/31	SU	221P	30	AP			FARMERSLIT30				
	100A- 200A	AM														
LINE# 13	CNN & TIME	M 1A		1	1/25	M	137A	30	AM			FARMERSLIT30				

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SUB-TOTALS

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IV. Copies of Opinions on the Notice Program

TIMOTHY C. PIGFORD, ET AL., APPELLEES v. ANN M. VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, APPELLANT

Nos. 02-5052 & 02-5053

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

352 U.S. App. D.C. 214; 292 F.3d 918; 2002 U.S. App. LEXIS 12283; 53 Fed. R. Serv. 3d (Callaghan) 275

May 1, 2002, Argued
June 21, 2002, Decided

SUBSEQUENT HISTORY: [**1] As Corrected August 8, 2002. Rehearing Denied August 26, 2002, Reported at: 2002 U.S. App. LEXIS 18009.

PRIOR HISTORY: Appeals from the United States District Court for the District of Columbia. (No. 97cv01978). (No. 98cv01693).

DISPOSITION: Reversed and remanded.

LexisNexis(R) Headnotes

COUNSEL: Howard S. Scher, Attorney, U.S. Department of Justice, argued the cause for appellant. With him on the briefs were Roscoe C. Howard, Jr., U.S. Attorney, and Robert M. Loeb, Attorney, U.S. Department of Justice.

Jason A. Levine argued the cause for appellants. With him on the brief were Anthony Herman and Alexander J. Pires, Jr.

JUDGES: Before: SENTELLE, RANDOLPH and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge TATEL.

OPINIONBY: TATEL

OPINION:

[*919] TATEL, *Circuit Judge*: The question presented in this appeal concerns a district court's authority to interpret or modify a consent decree--here, the settlement of a class action brought by over 20,000 **African**-American **farmers** charging the United States Department of Agriculture with racial discrimination in lending practices. Due to class counsel's failure--"bordering on legal malpractice," the district court called it--to meet critical consent decree deadlines, the district court interpreted the decree to allow extension of such deadlines "so long as justice requires." Although we find that the district court exceeded [**2] its interpretive authority under the decree, we hold that class counsel's conduct justifies modifying the decree under Federal Rule of Civil Procedure 60(b)(5). But because the order does not satisfy the "tailoring" requirement for a Rule 60(b)(5) modification, *see Rufo v. Inmates* [*920] *of the Suffolk County Jail*, 502 U.S. 367, 383, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992), we reverse and remand for further proceedings.

I.

Proceeding under the Equal Credit Opportunity Act, 15 U.S.C. § § 1691-1691f, three **African**-American **farmers** filed this class action against the United States Department of Agriculture alleging racial discrimination in the administration of federally funded credit and benefit programs. The class ultimately included 22,000 similarly situated **farmers** from fifteen states. Shortly before the **farmers** filed suit, the Department released a report commissioned by then-Secretary Dan Glickman "to address [the agency's] longstanding civil rights problems," documented since the 1960s by numerous federal government "studies, reports, and task forces." CIVIL RIGHTS ACTION TEAM, USDA, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT

OF AGRICULTURE [**3] 2-3 (1997), *available at* http://www.usda.gov/news/civil/cr_next.htm. Examining the "painful history" of its dealings with **African**-American **farmers,** the Department concluded that local credit and loan agencies responsible for administering Department programs often discriminated against the **farmers.** *Id.* at 6. According to the Glickman report, Department officials had "effectively dismantled" the Office for Civil Rights Enforcement--the very office charged with addressing discrimination complaints. *Id.* at 47-48 (internal quotation marks and citation omitted). "Often making matters worse," the "complaints processing system" was a "bureaucratic nightmare" that "processed [complaints] slowly, if at all," resulting in a huge "backlog," while at the same time the agency "proceeded with farm foreclosures--even where discrimination may have contributed to the **farmers**' plight." *Id.* at 22-25. "Minority **farmers,**" the report concluded, "lost significant amounts of land and potential farm income as a result of discrimination by [USDA] programs." *Id.* at 30.

After Congress intervened to preserve the **farmers**' claims by tolling the Equal Credit Opportunity Act's two-year statute [**4] of limitations, *see Pigford v. Glickman*, 185 F.R.D. 82, 88-89 (D.D.C. 1999) (citing 15 U.S.C. § 1691e(f)), the parties entered into a consent decree. Designed to "ensure that in their dealings with USDA, all class members receive full and fair treatment that is the same as the treatment accorded to similarly situated white persons," the decree establishes procedures for resolving class members' individual claims. Consent Decree at 2. Specifically, the decree allows class members to choose between two claims procedures, known as Tracks A and B. In recognition of the fact that "most ... [class] members ... had little in the way of documentation or proof" of either discriminatory treatment or damages suffered, Track A awards $ 50,000 to those **farmers** able to "meet only a minimal burden of proof." *Pigford*, 185 F.R.D. at 103. Track B--the mechanism at issue here--imposes no cap on damages, but requires **farmers** who choose this track, after limited discovery consisting "essentially [of] an exchange of lists of witnesses and exhibits and depositions of the opposing side's witnesses," to prove their claims by a preponderance of [**5] the evidence in one-day mini-trials before an arbitrator. *Id.* at 106. Set forth in paragraph 10 of the decree, Track B establishes strict time frames: the arbitrator sends a hearing notice within 10 days of receiving a Track B claim and holds a hearing no more than 150 days later; at least 90 days before the hearing, the Department and claimant file and serve on each other witness lists, summaries of direct testimony, and copies of all exhibits; discovery ends no later than 45 days before the hearing; and no fewer than 21 days before the hearing, both sides [*921] list witnesses they intend to cross-examine and file summaries of all legal and factual issues. Consent Decree P 10(a)-(e). Track A and B decisions are final, except that the losing side may petition for review by a court-appointed monitor. *Id.* P P 9(a)(v), 9(b)(v), 10(i), 12(b)(iii).

Following notice to the class and a hearing, the district court approved the consent decree as "fair, adequate, and reasonable," pursuant to Federal Rule of Civil Procedure 23. *Pigford*, 185 F.R.D. at 113. According to the district court, the decree represents an "historical first step toward righting the wrongs [**6] visited upon thousands of **African**-American **farmers** for decades by the [USDA]." *Pigford v. Glickman*, 127 F. Supp. 2d 35, 40 (D.D.C. 2001). Our opinion affirming the district court's approval of the decree noted its importance for both the **farmers** and the government: the "United States is likely to provide an estimated $ 2 billion in debt relief and monetary payments in consideration for the dismissal of the class's complaint." *Pigford v. Glickman*, 340 U.S. App. D.C. 420, 206 F.3d 1212, 1214 (D.C. Cir. 2000). Ultimately, 21,546 claims were accepted for review--21,358 under Track A and 188 under Track B.

The decree provided for class counsel to receive an advance payment of $ 1 million in fees to cover decree "implementation." Consent Decree P 14(b). The decree entitled counsel to seek additional fees under the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d), for their work in connection with filing the action and implementing the decree, Consent Decree P 14(a). One year into the implementation process, the district court "took the extraordinary step of awarding a second advance"--this time for $ 7 million. Order of the United [**7] States District Court for the District of Columbia at 2 (Mar. 8, 2001) (No. 97cv01978). The Department and class counsel eventually settled all fee claims for $ 14.9 million. Attorneys and firms sharing the fees were: Alexander J. Pires, Jr., of Conlon, Frantz, Phelan, Pires & Leavy; Phillip L. Fraas, of Tuttle, Taylor & Heron; J.L. Chestnut, of Chestnut, Sanders, Sanders & Pettaway; T. Roe Frazer, of Langston, Frazer, Sweet & Freese; Hubbard Saunders IV, of The Terney Firm; Othello Cross, of Cross, Kearney & McKissic; Gerard Lear, of Speiser Krause; and William J. Smith.

Several months after class counsel received their second fee advance and just two weeks prior to the deadline for filing petitions for monitor review for the "vast majority of claimants [in both tracks]," class counsel filed an emergency motion seeking an extension of time. Order of the United States District Court for the District of Columbia at 2 (Nov. 8, 2000) (No. 97cv01978). Counsel revealed that they had filed only a small fraction of the total petitions requested by the **farmers.** Concerned that "counsel's failings ... not be

visited on their clients," *id*. at 3, and relying on "explicit assurances" by [**8] counsel as to the work load they could realistically shoulder into the future, *Pigford v. Veneman*, 141 F. Supp. 2d 60, 62 (D.D.C. 2001), the district court permitted counsel to file pro forma petitions by the original deadline and then to either file supporting materials or to withdraw the petitions at the rate of at least 400 petitions per month, *see* Order of the United States District Court for the District of Columbia at 5-6 (Nov. 8, 2000) (No. 97cv01978).

A few months later, the district court observed "a very disturbing trend": class counsel had failed to meet their monthly quota "even once." *Pigford*, 141 F. Supp. 2d at 62. Worse still, counsel had "drastically cut its staff, bringing Class Counsel's ability to represent the [**farmers**] into serious question." *Id*. "Alarmed by Class Counsel's consistent failure" to meet decree timelines, the district [*922] court noted counsel's "remarkable admission that they never had a realistic expectation of meeting" agreed-upon or court-ordered deadlines for the monitor review process. Order of the United States District Court for the District of Columbia at 2-3 (Apr. 27, 2001) (No. 97cv01978). The court [**9] described counsel's performance as "dismal"--"bordering on legal malpractice"--and "wondered" whether class counsel would have been in such a predicament had they not filed "three new sister class actions" against the Department. *Id*. at 2-3 & n.1, 5.

The district court eventually imposed a series of escalating daily fines on class counsel for untimely monitor review filings. *Pigford v. Veneman*, 143 F. Supp. 2d 28, 32 (D.D.C. 2001). Instead of simply submitting materials in support of their clients' petitions in a more timely fashion, however, counsel drastically increased the rate at which they *withdrew* petitions for monitor review--from 19% to 48%--"once again" leading the district court to "question Class Counsel's fidelity to their clients." *Pigford v. Veneman*, 148 F. Supp. 2d 31, 33 & n.1 (D.D.C. 2001).

Class counsel's failure to cope with their responsibilities extended to the Track B process. Consider the case of Earl Kitchen, a **farmer** from Arkansas who filed a Track B claim. Kitchen was initially represented by Jesse L. Kearney, a member of one of the firms sharing in the fee award, Cross, Kearney & McKissic. During the course of representing [**10] Kitchen, Kearney obtained extensions of several paragraph 10 deadlines either with consent or over the Department's objection. Around the time the Department agreed to pay class counsel $ 14.9 million, Kearney missed the deadline (already extended by mutual consent) to submit written direct testimony. Kearney's failure could have drastic consequences, for absent submission of testimony, Kitchen's claim will "be extinguished." Appellees' Br. at 12; *see also* Consent Decree P 10(g) (putting the burden of proof on the claimant).

In the meantime, the district court, deeply concerned about the decree's viability, asked the American Bar Association Committee on Pro Bono and Public Services to "assemble a team of *pro bono* lawyers to assist Class Counsel on an emergency basis." Order of the United States District Court for the District of Columbia at 7 (Apr. 27, 2001) (No. 97cv01978). In response, lawyers from the Pro Bono Committee and the firms of Arnold & Porter and Crowell & Moring recruited some of Washington's largest law firms: Covington & Burling; Sidley, Austin, Brown & Wood; Steptoe & Johnson; Swidler, Berlin, Shereff & Friedman; and Wilmer, Cutler, and Pickering. The district [**11] court, recognizing the competing demands on class counsel arising out of their representation of multiple claimants in both tracks and at various stages of the claims resolution process, hoped that this added assistance would lift the "heavy burden of Track B litigation from the shoulders of Class Counsel," enabling them to "focus on the petition [for monitor review] process." *Pigford*, 143 F. Supp. 2d at 30 n.1.

Pro bono counsel took over the representation of Earl Kitchen and asked the Department to extend the time for filing written direct testimony. The Department refused. As a result and because class counsel had apparently missed deadlines in other Track B cases, pro bono counsel filed a "motion to endow," asking the district court "to interpret (and if necessary, to modify) the Consent Decree, so that Arbitrators have discretion to extend deadlines when strict compliance with the original scheduling framework would defeat the Decree's overarching remedial purposes." Pls.' Mot. to Endow at 1. [*923] Granting the motion, the district court found it "implicit" in the Decree's terms that arbitrators have such discretion. *Pigford v. Veneman*, 182 F. Supp. 2d 50, 53 (D.D.C. 2002). [**12]

The Department appeals. At its request, we entered a stay pending appeal.

II.

District courts possess two types of authority over consent decrees. First, they may interpret and enforce a decree to the extent authorized either by the decree or by the related order. *See Bd. of Trustees of Hotel & Rest. Employees Local 25 v. Madison Hotel, Inc.*, 321 U.S. App. D.C. 145, 97 F.3d 1479, 1484 n.8 (D.C. Cir. 1996) (observing that a district court retains enforcement jurisdiction over a settlement if litigants so provide in their stipulation of dismissal or the dismissal order incorporates the settlement terms). Second, they may modify a decree pursuant to Federal Rule of Civil

Procedure 60(b)(5). *See Rufo*, 502 U.S. at 378-79 (holding that the Rule 60(b)(5) standard for modifying judgments applies to consent decrees). These two sources of authority reflect a consent decree's hybrid character, having qualities of both contracts and court orders. *See id*. at 378 (explaining that a consent decree "is contractual in nature" but also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree"). [**13]

The **farmers** based their "motion to endow" on both sources of authority. In granting the motion, the district court explained that it was exercising its "authority to enforce and to interpret an approved Consent Decree." *Pigford*, 182 F. Supp. 2d at 51. Although the court thus never addressed the question of its Rule 60(b)(5) authority, the **farmers** maintain that we may affirm the order on either ground. We consider each in turn.

Interpretation and Enforcement

Reasoning that the decree "explicitly allows for its construction in a liberal manner," and that paragraph 10 "delegates" the district court's authority over Track B claims to arbitrators, the district court found it "implicit in the terms of the Consent Decree" that arbitrators "have essentially the same authority over Track B hearings that a trial judge would have over a trial or related pre-trial proceedings," including "discretion to allow for revision of certain deadlines, *even after the deadlines have passed*, so long as justice requires the revisions and provided that the burden on the defendant is not so great as to outweigh the interest of the claimant in fully presenting his or her claim." *Id*. at 51-53. [**14] The Department argues that the consent decree gives the district court no such authority. According to the Department, the district court's only authority either to interpret or enforce the consent decree comes from paragraph 13, which "concerns ... alleged violations of any provision of the ... Decree," and directs "the person seeking enforcement of a provision of the ... Decree" to attempt to resolve any problems without court intervention and then to seek enforcement through contempt proceedings. Consent Decree P 13; *see also id*. P 21 (retaining the court's authority to enforce the decree through contempt proceedings). Since the **farmers** neither alleged a violation nor invoked the procedures for "seeking enforcement," the Department contends that the district court lacked jurisdiction to consider the "motion to endow." Defending the district court's order and relying on our statement in *Beckett v. Air Line Pilots Ass'n* that it is a "well-established principle that a trial court retains jurisdiction to enforce its consent decrees," 995 F.2d 280, 286 (D.C. Cir. 1993), the **farmers** argue that the order was "properly grounded on jurisdiction 'ancillary' to that explicitly [**15] conferred [*924] by paragraph 13," Appellees' Br. at 21. Pursuant to this "ancillary jurisdiction," the **farmers** contend, the district court properly "enforced" the decree's "overarching remedial purposes." *Id*. at 20. The **farmers** also argue that quite apart from paragraph 13, the district court had "inherent" authority to interpret the decree. *Id*. at 21.

We agree with the Department. In *Kokkonen v. Guardian Life Insurance Co. of America*, the Supreme Court held that a district court lacked "ancillary jurisdiction" to enforce a consent decree because neither the decree nor the order dismissing the case expressly retained jurisdiction to do so. 511 U.S. 375, 380, 128 L. Ed. 2d 391, 114 S. Ct. 1673-81 (1994). Although *Kokkonen* differs from the situation here--the consent decree in this case does retain certain enforcement jurisdiction--the decision teaches that district courts enjoy no free-ranging "ancillary" jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order. *See* 511 U.S. at 381 (explaining that if the dismissal order had retained jurisdiction or incorporated the settlement, then "a breach of the agreement would be a violation [**16] of the order, and ancillary jurisdiction to enforce the agreement would therefore exist"). Accordingly, an enforcement clause limited by its plain language, as is paragraph 13, to situations involving decree violations confers no ancillary jurisdiction to enforce the decree's "overarching ... purposes." Indeed, when the district court approved the decree, it observed that the parties added the enforcement provision because the original version "appeared to prevent the Court from exercising jurisdiction in the event that the USDA did not comply with [its] terms," *Pigford*, 185 F.R.D. at 110, bolstering our view that the enforcement provision means what it says.

Beckett does not warrant a different result. Not only did the *Beckett* decree preserve the district court's "jurisdiction over [the] case to enforce the terms of [the] ... decree," 995 F.2d at 286, but the party seeking enforcement in *Beckett*--unlike the **farmers** here--alleged that the other party had violated the decree's terms, 995 F.2d at 281.

Equally unpersuasive is the **farmers'** argument that we need not worry about paragraph 13's limitations because the district [**17] court possesses "inherent" interpretive power over the decree "whether or not for explicit enforcement purposes." Appellees' Br. at 21. For one thing, we see no way the district court's interpretive authority can be unhinged from its enforcement authority. If the district court lacks paragraph 13 enforcement authority (because the **farmers** alleged no violation), then the **farmers** gain nothing from an interpretation that arbitrators may adjust paragraph 13 deadlines. Furthermore, none of the appellate cases cited by the **farmers** supports their assertion that "many cases

... have recognized the 'inherent' jurisdiction of courts to interpret consent decrees," *id*., apart from any enforcement power. Two of the cases involved decree modifications, not interpretations. *See Waste Mgmt. of Ohio, Inc. v. Dayton*, 132 F.3d 1142, 1146 & n.4 (6th Cir. 1997); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365 (5th Cir. 1995). The third upheld, as a valid consent decree interpretation, a district court's imposition of interim deadlines not specified in the decree. *See Juan F. By and Through Lynch v. Weicker*, 37 F.3d 874 (2d Cir. 1997). The order in that [**18] case, however--unlike the one here--provided for court intervention "when plaintiffs showed the defendant was 'likely' to be in noncompliance"; the additional deadlines represented a permissible [*925] interpretation because they served to "ensure compliance." *Id*. at 879.

Our conclusion that the district court's interpretive and enforcement authority depends on the terms of the decree and related court order, rather than on some "ancillary" or "inherent" power, comports with a consent decree's contractual character. *See Rufo*, 502 U.S. at 378. In this case, for example, the **farmers** and the Department bargained over Track B's time frames. Track B's "abbreviated and unambiguous deadlines," the Department candidly tells us, serve its interests by "limiting the number of class members who ... opt for the Track B process and ... enhancing the government's ability to defend against [those] claims." Appellant's Br. at 24-25. The parties also bargained over paragraph 13, agreeing to limit district court enforcement authority to situations where the decree is violated. To now hold that the district court, through either some "ancillary" authority to enforce the [**19] decree absent a violation or "inherent" authority to interpret it, may permit extensions of Track B deadlines would not only deny the Department the benefit of its bargain, but would also discourage settlements. Who would sign a consent decree if district courts had free-ranging interpretive or enforcement authority untethered from the decree's negotiated terms?

Modification

The **farmers** argue that even if the district court lacked authority to interpret the decree to allow extension of Track B deadlines, we may still affirm the order as a proper modification pursuant to Rule 60(b)(5). This rule permits courts, "upon such terms as are just," to "relieve a party or a party's legal representative from a final judgment, order, or proceeding ... [if] it is no longer equitable that the judgment should have prospective application." "[A] significant change in circumstances," the Supreme Court has held, may "warrant[ ] revision of [a] decree." *Rufo*, 502 U.S. at 383. Such changed circumstances include "unforeseen obstacles" that make a decree "unworkable." *Id*. at 384. Any modification must be "suitably tailored to the changed circumstances." [**20] *Id*. at 383.

According to the **farmers,** two "significant changed ... circumstances" make the consent decree "unworkable." They first point to a "dramatic and unexpected expansion in class size"--from 2000 (the number originally estimated) to 22,000 (the final number). Appellees' Br. at 31. As the Department points out, however, at the time the district court approved the decree, the parties realized the class already had between "15,000 and 20,000" members. *Pigford*, 185 F.R.D. at 94. Although this may well suggest that the actual increase was not "significant" enough to justify modification, we decline to resolve that issue, for the district court did not rely on the larger class size as a basis for the order at issue here.

Class counsel's "inability to represent all Track B claimants adequately," *Pigford*, 182 F. Supp. 2d at 52, the **farmers** next argue, also provides a basis for a Rule 60(b)(5) modification. The Department concedes not only that counsel for "Kitchen and a number of other class members" committed "what appears to be malpractice," but also that this represents a "relevant new fact." Appellant's Br. at 28. Even so, the [**21] Department insists, the **farmers'** remedy is not to deny the Department the benefit of its bargained-for Track B deadlines, but rather to sue class counsel for malpractice. " 'Clients must be held accountable for the acts and omissions of their attorneys.' " *Id*. at 29 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, [*926] 507 U.S. 380, 396-97, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993)).

As a general matter, the Department is correct. In *Link v. Wabash Railroad Co*., the case on which the Department primarily relies, the Supreme Court held that the failure of plaintiff's lawyer to attend a pretrial conference justified dismissing the case for want of prosecution. 370 U.S. 626, 633, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962). Because plaintiff "voluntarily chose [his] attorney as his representative," the Court held, he could "[ ]not ... avoid the consequences of the acts or omissions of this freely selected agent." 370 U.S. at 633-34.

Neither *Link* nor any other case the Department cites, however, was a class action. In this case, except for the three named plaintiffs, not one of the thousands of class members "voluntarily chose" class counsel. Quite to the contrary, [**22] by certifying the class, the district court effectively appointed counsel for the **farmers.** Under Rule 23(a)(4), moreover, the district court, as a condition of class certification, had to find that class counsel would "adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); *see also McCarthy v. Kleindienst*, 239 U.S. App. D.C. 247, 741

F.2d 1406, 1411 n.3 (D.C. Cir. 1984) (noting that Rule 23's requirement of adequate representation encompasses "concerns about the competency of class counsel" (internal quotation marks and citation omitted)). Exercising this responsibility, the district court found that "Mr. Alexander Pires and Mr. Phillip Fraas as lead counsel and Mr. J.L. Chestnut, Mr. Othello Cross, Mr. T. Roe Frazer, Mr. Hubbard T. Saunders, IV, Mr. Gerald Lear and Mr. James Myart, Jr., all serving as of counsel ... demonstrated that they will advocate vigorously for the interests of the class" and therefore "adequately will represent the interests of the class." *Pigford v. Glickman*, 182 F.R.D. 341, 350 (D.D.C. 1998).

In so distinguishing *Link*, we do not mean to suggest that the presumption of client accountability for attorney [**23] conduct has no applicability in class actions. Certainly a contrary rule would make class action settlements problematic. Moreover, the Rule 23(a)(4) finding of class counsel adequacy may partially substitute for the free choice found in conventional non-class litigation. Like most presumptions, however, this one is rebuttable. And in litigation involving a class--defined from the outset by its numerosity--where counsel is not in fact freely chosen by class members, it is logical that the presumption should be more easily overcome than if the clients had in fact freely chosen their attorneys.

At oral argument, the Department pointed out that even though the **farmers** may not have "freely selected" class counsel to pursue the underlying litigation, the decree permits them to choose other lawyers for Track A or B representation. Accordingly, the Department argues, holding the **farmers** accountable for their lawyers' dismal performance is perfectly appropriate. We disagree. Although the decree technically permits class members to retain other lawyers, we think the circumstances of this case, together with the terms of the decree itself, make such choices unlikely. For one thing, the decree [**24] prohibits lawyers from charging for their work in claims proceedings, *see* Consent Decree P 5(e), so lawyers desiring payment must seek fees pursuant to the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d). Class counsel, however, received an advance fee award to provide such services. Class counsel also benefit from the district court's Rule 23 seal of approval. No wonder Earl Kitchen (the only claimant for whom the record contains relevant information) was represented by Jesse Kearney, a member of one of the firms that shared in the fee advance and ultimately the $ 14.9 million settlement. [*927] Because Kitchen did not "voluntarily choose" Kearney in the usual sense, we see no basis for holding Kitchen responsible for Kearney's failure to file direct testimony on time.

Contrary to the Department's argument, we see nothing unfair about this result. Although we have no doubt that the Department expected Track B's tight deadlines to discourage claims--even to make them less winnable--the Department never counted on class counsel's virtual malpractice. Indeed, the decree itself assumes competent representation for the **farmers.** The decree's express purpose is [**25] to "ensure that in their dealings with USDA, all class members receive full and fair treatment," Consent Decree at 2, and its "main accomplishment was the *establishment of a process* to adjudicate individual claims." Opinion and Order of the United States District Court for the District of Columbia at 8 (Mar. 8, 2001) (No. 97cv01978) (emphasis added). Unless the **farmers** have competent counsel, we cannot imagine how they could ever obtain "full and fair treatment" in a claims process where (as in Kitchen's case) missing a single deadline could be fatal.

For all of these reasons, we conclude that class counsel's failure to meet critical Track B deadlines amounts to an "unforeseen obstacle" that makes the decree "unworkable." *Rufo*, 502 U.S. at 384. To hold otherwise would sanction the **farmers'** double betrayal: first by the Department, *see* CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 2-30, and then by their own lawyers.

Having said all this, however, we cannot affirm the challenged order as a proper Rule 60(b)(5) modification because of *Rufo*'s second requirement--that the modification be "suitably tailored to the changed circumstances." 502 U.S. at 391. [**26] Because the district court viewed its order as an interpretation, not a modification, it had no occasion to consider the tailoring requirement. In our view, the order, vesting arbitrators with generic authority to revise deadlines "so long as justice requires," *Pigford*, 182 F. Supp. 2d at 52-53, is far too broad. Although the order restores the **farmers** to the position in which they would have been but for counsel's dismal performance (it may even, as the Department argues, put them in a better position), the order potentially deprives the Department of all Track B deadlines. By contrast, a "suitably tailored" order would return *both* parties as nearly as possible to where they would have been absent counsel's failures. In Kitchen's case, a properly "tailored" remedy would, for example, reset the Track B clock at the point in the process where Kearney dropped the ball, establishing a new deadline for submitting direct testimony and leaving subsequent deadlines unchanged. Whatever tailoring method the district court ultimately adopts, *see United States v. Western Elec. Co.*, 310 U.S. App. D.C. 281, 46 F.3d 1198, 1207 (D.C. Cir. 1995) (recognizing a [**27] district court's "considerable discretion" in fashioning a Rule 60(b)(5) modification), it must preserve the essence

of the parties' bargain: for the **farmers,** an opportunity to have their individual claims pursued by competent counsel; and for the Department, the benefit of the consent decree's tight deadlines.

III.

We reverse the district court's order and remand the case for proceedings consistent with this opinion, Rule 60(b)(5), and *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 377, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992). *See* 28 U.S.C. § 2106 (authorizing federal appellate courts to "remand the cause and ... require [*928] such further proceedings to be had as may be just under the circumstances").

So ordered.

TIMOTHY C. PIGFORD, ET AL., APPELLEES; LEONARD C. COOPER, APPELLANT v. DAN GLICKMAN, SECRETARY, THE UNITED STATES DEPARTMENT OF AGRICULTURE, APPELLEE

No. 99-5222, Consolidated with No. 99-5223

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

340 U.S. App. D.C. 420; 206 F.3d 1212; 2000 U.S. App. LEXIS 5827

February 28, 2000, Argued
March 31, 2000, Decided

PRIOR HISTORY: [**1] Appeals from the United States District Court for the District of Columbia. (No. 97cv01978). (No. 98cv01693).

DISPOSITION: Affirmed the order of approval of the district court.

LexisNexis(R) Headnotes

COUNSEL: David M. Schnorrenberg argued the cause for appellant. With him on the briefs were Richard T. Seymour, Teresa A. Ferrante, Stephon J. Bowens, Marcus Jimison, J. Michael Klise and Matthew C. Hans. Julie Nepveu and Julie L. Gantz entered appearances.

Alexander J. Pires, Jr. argued the cause for appellees Freddie Jones, et al. With him on the brief was Phillip L. Fraas.

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellee Dan Glickman, Secretary, The United States Department of Agriculture. With him on the brief were David W. Ogden, Acting Assistant Attorney General, Marleigh Dover, Special Counsel, and Wilma A. Lewis, U.S. Attorney.

JUDGES: Before: SENTELLE, ROGERS and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge ROGERS.

OPINIONBY: ROGERS

OPINION:

[*1213] ROGERS, *Circuit Judge*: Leonard C. Cooper appeals the district court's order approving a consent decree settling lawsuits brought by a class of approximately 20,000 **African**-American **farmers,** of which Mr. Cooper is a [**2] member, against the United States Department of Agriculture ("USDA"). n1 *See Pigford v.* [*1214] *Glickman*, 185 F.R.D. 82 (D.D.C. 1999). Under the decree, the United States is likely to provide an estimated $ 2 billion in debt relief and monetary payments in consideration for the dismissal of the class' complaint alleging that USDA systematically discriminated against them on the basis of their race. *See id*. at 111. Making no claim that the **farmers'** individual claims cannot be fairly and justly resolved under the decree, Mr. Cooper contends instead that the benefits of the consent decree are illusory because USDA has reserved the right in paragraphs 19 and 21 to undo the decree by regulatory fiat, depriving the **farmers** of any judicial relief and, thus, the district court abused its discretion in approving the decree as fair, adequate, and reasonable under Rule 23(e) of the Federal Rules of Civil Procedure. As clarified by stipulations in the briefing and oral argument on appeal, no basis exists to conclude that USDA would promulgate such a regulation under laws in effect when the decree was approved by the district court. While paragraph 19 leaves the class [**3] exposed to potential congressional enactments nullifying or modifying the consent decree, the class would bear that risk in any event, at least so long as the decree remains executory. Additionally, Mr. Cooper's contention concerning the limitation of the district court's authority by paragraph 21 is inconsistent with the plain language of that provision. Accordingly, because Mr. Cooper's contentions are unpersuasive on their own

terms, and, in light of the benefits conferred on the class by the decree taken as a whole, we find no abuse of discretion by the district court, and we affirm.

n1 Mr. Cooper is the only member of the class to appeal although in noting his appeal he purported to file on behalf of himself individually and as a representative of a class of **African**-American **farmers,** sending copies to nine named persons. None of those persons is a named appellant, however. The class representatives, the named plaintiffs in the district court, and the Secretary of Agriculture are appellees.

I.

The [**4] consent decree settling the class action was the product of lengthy and, at times, contentious negotiations. The background is set forth in Judge Friedman's comprehensive opinion, *Pigford*, 185 F.R.D. at 89-92, familiarity with which is assumed, and we repeat only the details necessary for this opinion. n2

n2 The district court's opinion appears as an appendix to this opinion.

USDA indirectly administers programs that provide credit and other benefits to **farmers.** The USDA's credit and benefit programs are federally funded, but the decisions to approve or deny applications for credit or benefits are made at the county level by a committee of three to five members elected by local **farmers** and ranchers. In addition to acting on credit and benefit applications, the county committee appoints a county executive to assist **farmers** in completing their applications and to recommend to the county committee which applications should be approved. *Id.* at 86. USDA has promulgated a number of [**5] regulations governing how these officials are to administer the credit and benefit programs, but the evidence before the district court shows that USDA has exercised little oversight regarding how applications historically have been processed at the county level. *Id.* at 86-88. For years, **African**-American **farmers,** who have been significantly under represented on the county committees, *see id.* at 87, have complained that county officials have exercised their power in a racially discriminatory manner, resulting in delayed processing or denial of applications for credit and benefits by **African**-American **farmers** not experienced by white **farmers** who are similarly situated. *Id.* at 87-88. Such discriminatory treatment is prohibited by statute and by regulation. *See* 15 U.S.C. § 1691(a) (1994); 7 C.F.R. § § 15.51, 15.52 (1999). In December 1996, the Secretary of Agriculture appointed a Civil Rights Action Team to investigate allegations of racial discrimination in the administration of USDA credit and benefit programs, and, in February 1997, the USDA Inspector General reported that USDA had a backlog of discrimination [**6] complaints in need of immediate attention. [*1215] The President and the Secretary thereafter sought appropriations to carry out the recommendations to improve USDA's civil rights efforts. *Pigford*, 185 F.R.D. at 111.

On August 28, 1997, three **African**-American **farmers** filed suit on behalf of a putative class of similarly situated **African**-American **farmers** alleging racial discrimination in the administration of USDA programs and further harm from the allegedly surreptitious dismantling of USDA's Office of Civil Rights in 1983, which together were alleged to violate the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, prohibiting discrimination in consumer credit. Following amendments to the complaint, the district court granted class certification in October 1998. *See Pigford*, 185 F.R.D. at 90. At that time, most of the **farmers'** ECOA claims were arguably barred by a two-year statute of limitations. *See* 15 U.S.C. § 1691e [**7] (f). Responding to petitions from class members, Congress enacted, and the President signed in November 1998, an amendment to retroactively extend the limitations period for persons who had filed administrative complaints between January 1, 1981, and July 1, 1997, for acts of discrimination occurring between January 1, 1981, and December 31, 1996. n3 A second class action, *Brewington v. Glickman*, Civ. No. 98-1693, filed in July 1998 and making similar allegations covering a different time period, was consolidated with *Pigford* for purposes of settlement, and a new class was certified. *See Pigford*, 185 F.R.D. at 90.

n3 *See* Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297, notes); *see also* Statement By President William J. Clinton Upon Signing H.R. 4328, 34 Weekly Comp. Pres. Doc. 2108 (Nov. 2, 1998) ("This bill will also address the long-standing discrimination claims of many minority **farmers** by adopting my request to waive the statute of limitations on USDA discrimination complaints that date back to the early 1980s."), *reprinted in* 1998 U.S.C.C.A.N. 582.

[**8]

As the February 1999 trial date drew near, the parties' negotiations shifted from individual claims to a global settlement, *id*., and with the assistance of a court-appointed mediator, the parties developed and agreed to a consent decree that contemplated a two-track dispute resolution mechanism to determine whether individual class members had been the victims of discrimination and, if so, the amount of monetary relief to which they were entitled. If a class member opts for resolution under Track A, "class members with little or no documentary evidence [will receive] a virtually automatic cash payment of $ 50,000 and forgiveness of any debt owed to USDA," 185 F.R.D. at 95; whereas, class members opting for Track B resolution have the opportunity to prove their claims in a one-day mini-trial before an arbitrator and, if successful, the amount of monetary damages is not capped. *Id.* Class members dissatisfied with the opportunity for resolution of their claims under either Track A or Track B could opt out of the class within 120 days of entry of the consent decree, and file individual lawsuits. *Id*. The district court is to appoint a monitor from a list of names [**9] provided by the parties "to track and report on USDA's compliance with the terms of the Consent Decree." *Id*. at 109.

By law, the proposed consent decree could not take effect until the district court had approved it, *see* FED. R. CIV. P. 23(e), and the district court's approval could not be granted until notice had been given to the class of the proposed settlement and a fairness hearing had been held to determine whether the "settlement is fair, adequate, and reasonable and is not the product of collusion between the parties." *Pigford*, 185 F.R.D. at 98 (quoting *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998)). The district court held a day-long hearing in which representatives of eight organizations and sixteen individuals, including Mr. Cooper, voiced their objections to the terms of the proposed consent decree. Many, including Mr. Cooper, [*1216] objected to the absence of certain forms of prospective structural relief, notwithstanding the fact that the complaint, as amended, did not seek such injunctive relief. 185 F.R.D. at 110. While USDA was likely to face billion-dollar monetary liability under the decree, no changes to the [**10] county committee system were mandated, and objectors feared that no improvements would be made to the way in which the farm credit and non-credit programs are administered. *See* Transcript of Fairness Hearing ("Tr."), Mar. 2, 1999 at Joint Appendix (JA) 388 (Mr. Bowens); 493 (Mr. Cooper). They also maintained that insufficient information had been exchanged during the discovery period leading up to the settlement. However, at the fairness hearing, neither Mr. Cooper nor his counsel voiced the objections raised now on appeal to paragraphs 19 and 21 of the decree. Instead the National Council of Community Based Organizations in Agriculture ("NCCBOA") argued to the district court that paragraph 19 "contemplates that a future statute or regulation may interfere with the relief that is provided by the decree." Tr. at JA 410. Without specifically mentioning paragraph 21, NCCBOA objected to that provision on the grounds that the class members "are remitted to contract law claims against the Government, but the contract here expressly provides that they can't have their claims reinstated and the Government has got a defense because of its new regulation to the relief that's provided by [**11] the Consent Decree." Tr. at JA 411.

Following the hearing, the district court suggested fourteen changes to the proposed consent decree, including modifying paragraph 19 to require USDA to use its best efforts to comply with laws prohibiting discrimination and modifying paragraph 21 to make clear that the district court retained jurisdiction to enforce the consent decree with its contempt power. The class and USDA rejected the first suggestion and adopted the second. The district court then allowed another round of written objections to be filed to the revised consent decree. n4 After considering all of the objections and the entire record, the district court approved the proposed consent decree as fair under Rule 23 and ordered that the decree be entered. Mr. Cooper noted an appeal from the order, but he did not seek a stay of proceedings under the consent decree pending appeal. n5

n4 Objections made directly by Mr. Cooper questioned whether class counsel truly represented the interests of the class members and suggested that the decree contain a provision rendering it void if either USDA or class counsel took steps to obstruct the district court's jurisdiction to enforce the proposed decree. Mr. Cooper's counsel, on behalf of Mr. Cooper, filed eight pages of objections, which also questioned the capacity of class counsel to represent the class, but made no mention of either paragraphs 19 nor 21 nor of the enforceability of the decree as a general matter. In addition, the North Carolina Association of Black Lawyers Land Loss Prevention Project at North Carolina Central University Law School filed a set of objections jointly with three other organizations, including NCCBOA, which stressed, among other things, the view that in light of paragraphs 19 and 21, the district court's contempt power was inadequate to enforce the decree. [**12]

n5 Although the figures differ, USDA and class counsel represented in their respective

briefs that more than 20,000 persons have filed claims under the decree. *See* Appellee USDA's Br. at 15; Appellee Plaintiff Class' Br. at 12. At oral argument, class counsel represented that as of February 25, 2000, decisions in 9,573 Track A cases had been rendered of which 5,746 claims were granted and paid in an amount totaling $ 359,125,000. Of the 3,827 Track A claims that were denied in whole or in part, one third have been appealed under the terms of the consent decree. In addition, approximately 146 class members have opted for resolution under Track B. Four cases have been completed, and eighty others are in discovery.

II.

The law is well settled that the decision to approve a consent decree is committed to the sound discretion of the district court. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 299 (3d Cir. 1998). The district [*1217] court's role in reviewing the decree is to protect the interests of absent class members, and that is [**13] done primarily by evaluating the terms of the settlement in relation to the strength of their case. *See Thomas*, 139 F.3d at 231. The appellate court is not to substitute its views of fairness for those of the district court and the parties to the agreement, *see Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), but is only to determine whether the district court's reasons for approving the decree evidence appreciation of the relevant facts and reasoned analysis of those facts in light of the purposes of Rule 23. *See Thomas*, 139 F.3d at 231; *see also Kickapoo Tribe v. Babbitt*, 310 U.S. App. D.C. 66, 43 F.3d 1491, 1495 (D.C. Cir. 1995). Mr. Cooper bears the burden on appeal of making a "clear showing" that an abuse of discretion has occurred. *See Moore v. National Ass'n of Sec. Dealers*, 246 U.S. App. D.C. 114, 762 F.2d 1093, 1107 (D.C. Cir. 1985). He has not done so; on the contrary, the district court fulfilled the requirements of Rule 23 in exemplary fashion.

On appeal Mr. Cooper has abandoned the objections he raised in the district court regarding the lack of prospective structural relief and [**14] confines his challenge to the consent decree to paragraphs 19 and 21, which he contends give USDA, in effect, the right to unilaterally withdraw from the consent decree leaving class members with no judicial remedy. Mr. Cooper thus contends that the district court erred by failing to notify class members specifically of the terms of the two paragraphs and by approving the decree without requiring alteration or deletion of the two paragraphs. n6

n6 The paragraphs under attack provide:

> 19. Defendant's Duty Consistent With Law and Regulations
>
> Nothing contained in this Consent Decree or in the Final Judgment shall impose on the defendant any duty, obligation or requirement, the performance of which would be inconsistent with federal statutes or federal regulations in effect at the time of such performance.
>
> ...
>
> 21. No Effect if Default
>
> Subject to the terms of P 17, above, [conditioning the decree's obligations on a final judgment dismissing the complaint] and following entry by the Court of Final Judgment, no default by any person or party to this consent Decree in the performance of any of the covenants or obligations under this Consent Decree, or any judgment or order entered in connection therewith, shall affect the dismissal of the complaint, the preclusion of prosecution of actions, the discharge and release of the defendant, or the judgment entered approving these provisions. Nothing in the preceding sentence shall be construed to affect the Court's jurisdiction to enforce the Consent Decree on a motion for contempt filed in accordance with P 13 [requiring parties to conciliate before filing contempt motion].

The last sentence of paragraph 21 was added after the fairness hearing.

[**15]

In his opening brief, Mr. Cooper contended that USDA can use paragraph 19 to renege on its agreement in the consent decree in one of three ways: (1) Congress could pass new legislation that USDA could interpret to preclude some or all of the relief provided by the decree; (2) USDA could promulgate new regulations to the same effect without new legislation; or (3) USDA could

interpret existing law to bar the relief provided in the decree without promulgating a rule. In subsequent briefing by appellees class counsel and USDA, and at oral argument, it has been clarified that there was no intent that paragraph 19 include the second and third possibilities; rather, USDA stipulates, and class counsel concurs, in their respective briefs that paragraph 19 "simply recognizes the legal reality that Congress makes the laws, and that it is the obligation of the government to perform prospectively in conformance with the then binding laws enacted by Congress." *See* Appellee USDA's Br. at 25; Appellee Plaintiff Class' Br. at 11.

With that clarification, USDA's promise to perform under the consent decree is not illusory because USDA has not reserved a unilateral right to withdraw, *cf. Gray v. American Express Co.*, 240 U.S. App. D.C. 10, 743 F.2d 10, 19 (D.C. Cir. 1984) [**16] (interpreting New York [*1218] law), rather it would take action by Congress to enable USDA to withdraw from the consent decree. Consequently, under elementary principles of contract law, USDA's promise to perform was backed by consideration at the time it was made and the parties have assigned to the plaintiff class the marginal risk that Congress might nullify the agreement in some respect by future legislation. Although the evidence before the district court establishes the basis for class members' mistrust of USDA and concern that the risk may be more than hypothetical, *see Pigford*, 185 F.R.D. at 110, the fact that Congress and the President acted quickly to remove a limitations bar to the plaintiffs' recovery indicates that as of October 1998 all three branches of the federal government had taken steps to aid in the final resolution of the **farmers'** claims on the merits. The district court noted the priority commitment of the President and the Secretary of Agriculture, spurred by the efforts of the **African**-American **farmers,** to obtain funding to carry out recommendations improving USDA's civil rights efforts, as well as Congress' "unprecedented action of tolling the statute [**17] of limitations." *Id.* at 111. And Mr. Cooper acknowledged through counsel on appeal that he has no evidence that this three-branch commitment has waned. The district court could therefore reasonably conclude when approving the decree that the risk of a radical about-face in current federal policy was remote.

More fundamentally, even in the absence of paragraph 19, the class would bear the risk of such hypothetical legislation, at least so long as the decree remains executory. *See Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32, 15 L. Ed. 435 (1855); *BellSouth Corp. v. FCC*, 333 U.S. App. D.C. 253, 162 F.3d 678, 692-93 (D.C. Cir. 1998); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 273-274, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992). n7 Thus, we need not pass upon Mr. Cooper's' contentions concerning possible constitutional limitations on Congress' power to enact such legislation, *see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995), [**18] nor address the ramifications of such legislation under the reasoning of *United States v. Winstar Corp.*, 518 U.S. 839, 135 L. Ed. 2d 964, 116 S. Ct. 2432 (1996), to conclude that the district court did not abuse its discretion by approving the proposed consent decree, as amended, which assigns a risk to the plaintiff class that it would have borne in any event.

> n7 It is to be noted that the relief Mr. Cooper seeks, an order vacating the decree and remanding for trial, could require that plaintiffs' cases be tried over a number of years, *see Pigford*, 185 F.R.D. at 104, and thus could expose class members to this risk for a far longer period.

As to Mr. Cooper's contention that paragraph 21 deprives the **farmers** of the right to ask the district court to modify the decree or reinstate their lawsuit in the unlikely event that Congress passes legislation nullifying the decree, it too relies on a misplaced concern. Paragraph 21 provides that if the government *defaults* on its obligations [**19] under the decree, the plaintiff class can enforce the decree only by motion for civil contempt. Mr. Cooper reads this provision to also "strip[] the district court of its authority to reopen the final judgment" if Congress enacts legislation allowing for the decree to be nullified in whole or in part. However, the very basis for Mr. Cooper's contention concerning paragraph 19 is, and USDA agrees, that USDA would not be in default under the agreement if Congress passed new legislation nullifying, or directing the Secretary to nullify by regulation, the consent decree. Because that action would not qualify as a default, the provisions of paragraph 21 would not apply. Thus, Mr. Cooper's contention that the consent decree is unfair because the class would not be able to seek relief under Rule 60(b) of the Federal Rules of Civil Procedure is mistaken. On its face, paragraph 21 does not foreclose that avenue of relief when USDA has not [*1219] defaulted, and thus were Congress to enact the hypothesized legislation, paragraph 21 would not bar the class from seeking modification of the decree, subject to its ability to "establish that a significant change in facts or law warrants revision of the [**20] decree and that the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 393.

Moreover, not only do Mr. Cooper's contentions collapse under their own weight, but even were they to retain some persuasive force, the court must evaluate the district court's decision to approve the consent decree, with whatever shortcomings paragraphs 19 and 21 might present, in light of the agreement as a whole. *See Thomas*, 139 F.3d at 231. In that context, there is no doubt that the district court exercised its discretion well within the boundaries of the law. The serious concerns and objections to the proposed consent decree were carefully considered by the district court and balanced against the likely alternatives in a manner reflecting a considered and compassionate conclusion. *See, e.g., Pigford*, 185 F.R.D. at 101-04, 109-111. Neither Mr. Cooper nor, to our knowledge, any other class member contends at this point that the provisions of the consent decree providing monetary payments and loan forgiveness are unfair or unreasonable, and we have no occasion to consider whether these provisions are otherwise unfair [**21] or unreasonable. As a result, Mr. Cooper has failed to meet his burden to show that the enforcement provisions of the decree are so infirm as to render the entire agreement unfair or unreasonable. Furthermore, our reasons for finding Mr. Cooper's substantive contentions unpersuasive also lead us to reject his procedural contentions that the district court did not address the objections to paragraphs 19 and 21 with sufficient specificity and that notice to the class was inadequate because it did not specifically describe paragraphs 19 and 21.

The ultimate question before the court is whether the district court abused its discretion by approving a consent decree, the principal provisions of which are an indisputably fair and reasonable resolution of the class complaint, containing one paragraph that assigns to the class a risk it would have borne in any event and another paragraph that limits the mode of enforcing the decree in the event of default. To ask the question is to answer it. Because it is clear that no abuse of discretion occurred we do not reach the government's alternative argument concerning whether it would be equitable for this court to vacate the decree in light of [**22] the number of claims that have been resolved in reliance on the decree.

Accordingly, we affirm the order of approval of the district court.

APPENDIX

[SEE APPENDIX IN ORIGINAL]

(Pages 14 through 79 of slip opinion not available electronically)

TIMOTHY PIGFORD, et al., Plaintiffs, v. ANN VENEMAN, Secretary, United States Department of Agriculture, Defendant. CECIL BREWINGTON, et al., Plaintiffs, v. ANN VENEMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 97-1978 (PLF), Civil Action No. 98-1693 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

215 F.R.D. 2; 2003 U.S. Dist. LEXIS 6007

April 14, 2003, Filed

SUBSEQUENT HISTORY: Reconsideration denied by, Motion to strike denied by Pigford v. Veneman, 216 F.R.D. 1, 2003 U.S. Dist. LEXIS 8786 (D.D.C., May 28, 2003)

PRIOR HISTORY: Pigford v. Veneman, 2003 U.S. App. LEXIS 6972 (D.C. Cir., Apr. 10, 2003)

DISPOSITION: Defendant's motion to strike plaintiffs' response to defendant's response to plaintiffs' motion GRANTED.

LexisNexis(R) Headnotes

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For Ann Veneman, FEDERAL DEFENDANT (1:98-cv-1693): Elizabeth Goitein,

JUDGES: [**1] PAUL L. FRIEDMAN, United States District Judge.

OPINIONBY: PAUL L. FRIEDMAN

OPINION:

[*3] MEMORANDUM OPINION AND ORDER

The Court has before it defendant's motion to strike plaintiffs' response to defendant's response to the motion to reopen all late claims due to mail delays, as well as plaintiffs' opposition to the motion to strike and defendant's reply. Upon consideration of the parties' arguments, Rule 11 and Rule 12(f) of the Federal Rules of Civil Procedure, and the challenged document itself, the Court will grant defendant's motion to strike.

In a recent filing pertaining to its motion to reopen all late claims due to mail delays, class counsel Chestnut, Sanders, Sanders, Pettaway, Campbell & Albright made the following statement: "Throughout this litigation, Michael Sitcov has persistently demonstrated the same racist attitude of U.S.D.A. workers who systematically destroyed the farms and lives of thousands of **farmers,** simply because they were black." Response to Defendant's Response to Motion to Reopen All Late Claims Due to Mail Delays at 1-2 ("Pl. Response Regarding Mail Delays"). In a subsequent filing, Chestnut, Sanders wrote: "We believe Mr. Sitcov's dishonesty or wreckless [sic] [**2] disregard for the truth is inspired by his contempt for 'lawyers of color' who dare to challenge his unequal concern for black and white **farmers.**" Response to Motion to Strike at 3. Despite the enormity of these accusations, Chestnut, Sanders has provided no factual basis or evidence in support of its charges. Nor has the firm explained how such accusations could be relevant to plaintiff's pending motion to reopen late claims. Instead, Chestnut, Sanders simply accused defendant's lead counsel, Michael Sitcov -- an experienced and dedicated Department of Justice attorney and public servant of many years who has devoted nearly six years of his professional life to this important case -- of engaging in conduct of the most deplorable kind. The Court cannot abide this type of groundless accusation.

Almost from the beginning of this lawsuit, virtually every party and lawyer has endured sometimes harsh criticism -- from other parties to the case, from segments of the public and the media, and occasionally from this Court. The Court is well aware that attorneys both for plaintiffs and for the government have experienced frustration in their efforts throughout this difficult and

often contentious [**3] matter. Despite the disputes between counsel over a variety of issues in implementing the procedures agreed to in the settlement, however, it has been apparent to the Court from the very beginning that every attorney of record -- no matter who the client -- consistently has honored the fundamental rights of the **African**-American **farmers** on whose behalf the case was brought. Although Mr. Sitcov's role necessarily has been to protect and defend the [*4] interests of his client, the United States Department of Agriculture, the Court has no doubt that Mr. Sitcov always has recognized and respected the basic rights of plaintiffs and their lawyers, without regard to their race. Indeed, the Court has expressed its respect and appreciation for Mr. Sitcov's hard work and dedication repeatedly in open court, as early as March 2, 1999, at the Court's fairness hearing on the Consent Decree, and as recently as the December 11, 2002 status conference. See Transcript of Fairness Hearing, March 2, 1999 at 192-95; Transcript of Status Conference, December 11, 2002 at 41-43. Yet Chestnut, Sanders unfairly likens Mr. Sitcov to those within the Department of Agriculture and on the state level who unlawfully [**4] discriminated against **African**-American **farmers** for many years before this case was settled. See Pl. Response Regarding Mail Delays at 1-2.

Rule 11 of the Federal Rules of Civil Procedure provides, in relevant part, that by presenting to the court any "pleading, written motion, or other paper," an attorney "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the pleading "is not being filed for an improper purpose, such as to harass . . . and [that] the allegations and other factual contentions have evidentiary support . . . ." Fed. R. Civ. P. 11(b). Here, not only did Chestnut, Sanders fail to offer any evidence of Mr. Sitcov's alleged "racist attitude," but the Court can find nothing in the entire record of this case -- spanning many years, many hearings and many pages -- that would support such a charge. The Court has observed Mr. Sitcov and listened to his arguments and representations in court on scores of occasions, has met with him and opposing counsel in Chambers a number of times, and has read thousands of pages that he has either written or whose preparation he has supervised. [**5] While his frustration level may have risen over the years (and his choice of language in certain recent filings has reflected that frustration), Mr. Sitcov has appeared always to have acted professionally, honorably and ethically. There is no basis in fact and no evidentiary support for the charges that he has exhibited a racist attitude or that he has contempt for "lawyers of color." Such "abusive language toward opposing counsel has no place in documents filed with our courts; the filing of a document containing such language is one form of harassment prohibited by Rule 11." Coats v. Pierre, 890 F.2d 728, 734 (5th Cir. 1989).

In addition, Rule 12(f) of the Federal Rules of Civil Procedure provides that a court may strike any matter that is "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). n1 Although a motion to strike generally is disfavored because it seeks an extreme remedy, a court has "liberal discretion" to strike such filings as it deems appropriate under Rule 12(f). Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000); see 2 MOORE'S FEDERAL PRACTICE § 12.37[1] at 12-93 to 12-94 (3d ed. 2002). The [**6] word "scandalous" in Rule 12(f) "generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court." 2 MOORE'S FEDERAL PRACTICE § 12.37[3] at 12-97; see also In re 2TheMart.com Inc. Securities Litigation, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000) ("scandalous" includes allegations that cast "a cruelly derogatory light on a party or other person"). Chestnut, Sanders' charges of racism are plainly scandalous within the meaning of the Rule, in that they "improperly cast[] a derogatory light" on a dedicated government attorney who has done his best to navigate the deep and murky waters of this litigation. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1382 (2d ed. 1995). The accusations are indefensible and wholly inappropriate and have no place in filings in this court.

n1 Although Rule 12(f) applies by its terms only to "pleadings," courts occasionally have applied the Rule to filings other than those enumerated in Rule 7(a) of the Federal Rules of Civil Procedure. See, e.g., Cobell v. Norton, 213 F.R.D. 33, 2003 U.S. Dist. LEXIS 2813, No. 96-1285, 2003 WL 721477 (D.D.C. March 3, 2003) (considering Rule 12(f) motion to strike plaintiffs' response to defendant's historical accounting plan).

[**7]

Because the accusations of racism in the Chestnut, Sanders filings are unsupported by facts or evidence, constitute a form of harassment, [*5] and are scandalous, the Court will grant defendant's motion to strike Chestnut, Sanders' Response Regarding Mail Delays and *sua sponte* will strike Chestnut, Sanders' Response to the Motion to Strike, based both on Rule 11 and on Rule 12(f) of the Federal Rules of Civil Procedure. See 2 MOORE'S FEDERAL PRACTICE § 12.37[1] at 12-94; McCorstin v. United States Dep't of

Labor, 630 F.2d 242, 244 (5th Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

Finally, counsel are reminded that Local Civil Rule 83.8(b)(6)(v) of the Rules of this Court requires all counsel to familiarize themselves with the D.C. Bar Voluntary Standards for Civility in Professional Conduct, which are included as Appendix D to those Rules. Among other things, the Standards provide that

> we [attorneys] will treat all participants in the legal process, including counsel . . . in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. . . . Except within the bounds of fair argument [**8] in pleadings or in formal proceedings, we will abstain from disparaging personal remarks or acrimony toward such participants . . . . We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel. . . . We will not degrade the intelligence, ethics, morals, integrity or personal behavior of others, unless such matters are legitimately at issue in the proceeding.

D.C. Bar Voluntary Standards for Civility in Professional Conduct PP1, 3, 5, 28. Despite these established principles, the communications among counsel and some of their court filings in this case have grown less civil, less respectful, and less professional, and the language used by Chestnut, Sanders in its most recent filings is beyond the pale. Whatever the underlying issues in this lawsuit -- and despite the undeniably tragic history of discrimination against **African**-American **farmers** in this country -- counsel have an obligation to their clients, to this Court and to the legal profession not to engage in the type of conduct that is the subject of [**9] this Opinion and that has begun to pervade this case in recent months. When the lawyers involved in this litigation resort to scurrilous accusations and inflammatory remarks about opposing counsel, no one wins -- least of all the **African**-American **farmers** in whose name this case was brought.

For all of these reasons, it is hereby

ORDERED that defendant's motion to strike plaintiffs' response to defendant's response to plaintiffs' motion to reopen all late claims due to mail delays [763] is GRANTED; it is

FURTHER ORDERED that plaintiffs' response to defendant's response to plaintiffs' motion to reopen all late claims due to mail delays [776] is STRICKEN from the record in this case; it is

FURTHER ORDERED *sua sponte* that plaintiffs' Response to the Motion to Strike [772] is STRICKEN from the record in this case; and it is

FURTHER ORDERED that the Clerk of the Court is directed to strike these two documents from the records of this Court.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

TIMOTHY PIGFORD, et al., Plaintiffs, v. ANN M. VENEMAN, Secretary, United States Department of Agriculture, Defendant. CECIL BREWINGTON, et al., Plaintiffs, v. ANN M. VENEMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 97-1978 (PLF), Civil Action No. 98-1693 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

217 F. Supp. 2d 95; 2002 U.S. Dist. LEXIS 16955

September 11, 2002, Decided
September 11, 2002, Filed

DISPOSITION: [**1] Motion to vacate Consent Decree denied. Motion to remove lead Class Counsel denied.

LexisNexis(R) Headnotes

COUNSEL: For TIMOTHY C. PIGFORD, plaintiff (97-CV-1978): Jacob A. Stein, STEIN, MITCHELL & MEZINES, Alexander John Pires, Jr., CONLON, FRANTZ, PHELAN & PIRES, Anthony Herman, COVINGTON & BURLING, Richard Talbot Seymour, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP, David A. Branch, Washington, DC.

For TIMOTHY C. PIGFORD, plaintiff (97-CV-1978): J. L. Chestnut, Jr., CHESTNUT, SANDERS, SANDERS, PETTAWAY, CAMPBELL & ALBRIGHT, Selma, AL.

For CECIL BREWINGTON, plaintiff (98-CV-1693): Alexander John Pires, Jr., CONLON, FRANTZ, PHELAN & PIRES, Phillip L. Fraas, Washington, DC.

For ANN M. VENEMAN, federal defendant (97-CV-1978): Michael Sitcov, Terry M. Henry, Washington, DC. Elizabeth Goitein, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For DAN GLICKMAN, federal defendant (98-CV-1693): Michael Sitcov, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For ANN VENEMAN, federal defendant (98-CV-1693): Elizabeth Goitein, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

JUDGES: PAUL L. FRIEDMAN, United States District Judge.

OPINIONBY: PAUL L. FRIEDMAN

OPINION: [*97]

MEMORANDUM OPINION AND ORDER [**2]

The Court has before it two motions filed by several pro se members of the plaintiff class: a motion to vacate the Consent Decree in this case or, in the alternative, to stay all proceedings pending order on said motion, and a motion to remove lead Class Counsel, both requesting an emergency hearing. n1 Because the Court finds that these motions concern common issues, the Court will address both motions together.

n1 Four movants are named in the text of both motions: Thomas Burrell, Eddie Slaughter, Fernando Burkette and William H. Miller. Gary Grant also joins the motion to remove Class Counsel. Despite the government's objections that not all of the above movants or other individuals who have signed the motions are members of the plaintiff class with standing to bring these motions, the Court finds that more than one of the above-named individuals are members of the class and thus do have standing. See Response and Opposition of Conlon, Frantz, Phelan & Pires

to motion to vacate Consent Decree or in the alternative, to stay all proceedings pending order on said motion and request for emergency hearing at 1-2. Nor will the Court consider the representation of Class counsel that four of the five movants have no basis for complaint because they participated in the process to which they now object and prevailed on their claims. See id. The Court will move to the substance of the motions rather than address the issue of standing with respect to each movant.

[**3]

The Court finds no grounds to grant the extraordinary relief sought by movants. To the extent that these motions are based on the recent opinion of the United States Court of Appeals for the District of Columbia Circuit in this case, see Pigford v. Veneman, 292 F.3d 918 (D.C. Cir. 2002), [*98] movants have misread that opinion and the prior Orders of this Court cited therein.

I. MOTION TO VACATE THE CONSENT DECREE

With respect to the motion to vacate the Consent Decree, movants rely on the court of appeals' statement that the Decree is "unworkable." See Motion to Vacate Consent Decree at 2. In making that determination, however, the court of appeals necessarily was referring only to the tight deadline schedule of the Track B process -- since that was the matter before it -- although the judgment was influenced by the court's assessment of counsel's overall performance when faced with a workload well beyond what anyone could have imagined and counsel's failure to seek the assistance of this Court or other lawyers earlier. See Pigford v. Veneman, 292 F.3d at 926-27. The Consent Decree therefore was described as "unworkable" only with respect to the [**4] Track B process established by the Consent Decree and the relatively few Track B cases in which crucial deadlines were missed. See id. With respect to those cases, this Court may now fashion a narrow remedy that is "suitably tailored to the changed circumstances." Id. at 927 (citing Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 391, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992) (modification of consent decree permitted only where required by significant changes in law or fact and must be tailored to changed circumstances)). As the government notes, to vacate the Consent Decree would be "'far too broad' a remedy" to address the "unforeseen obstacles" that have arisen in some Track B cases. Government Opposition to motion to vacate Consent Decree at 4 (citing Pigford v. Veneman, 292 F.3d at 927). See also Rufo v. Inmates of the Suffolk County Jail, 502 U.S. at 384. Although Class Counsel have encountered many difficulties in the implementation of this enormously complex settlement agreement, those difficulties do not warrant vacating the Consent Decree.

Indeed, to vacate the Consent Decree would nullify the settlement of this case, "the grand, [**5] historical first step toward righting the wrongs visited upon thousands of **African**-American **farmers** for decades by the United States Department of Agriculture," Pigford v. Glickman, 127 F. Supp. 2d 35, 40 (D.D.C. 2001), and would undo the substantial progress that has been made for so many **African**-American **farmers** in the long five years since this case was filed. To vacate the Consent Decree also would require that every dollar already paid out to **African**-American **farmers,** whether in cash awards or in the form of debt relief or tax relief, be returned to the government. See id. To date, nearly $ 800 million of relief has gone to approximately 13,000 families of **African**-American **farmers.** n2 Requiring these families to pay back the considerable sums that they received would be an extreme, unwarranted remedy that would bring great hardship to thousands of members of the class.

n2 See Facilitator's Report of September 9, 2002 (available from Consent Decree Facilitator).

In urging the Court [**6] to vacate the Consent Decree, movants have made much of the court of appeals' reference to the "double betrayal" of **African**-American **farmers:** first, historically, by the Department of Agriculture and then -- at least as this Court reads the opinion -- by counsel in litigating the merits of certain individual claims under the Consent Decree. To the extent that some have read the "double betrayal" language more broadly, they are [*99] taking it out of context. As noted, the court of appeals' ruling pertained only to those Track B cases where crucial discovery and other deadlines have been missed, not to any events occurring before or even closely following entry of the Consent Decree. See Pigford v. Veneman, 292 F.3d at 927. The ruling did not relate at all to the over 20,000 Track A cases that were not the subject of the court of appeals' opinion. While the court of appeals criticized Class Counsel's failings regarding Track A, the ruling itself did not turn on those errors but only on the mishandling of Track B claims. Finally, the court of appeals' "double betrayal" language could not have related to any actions that may have been taken -- or not taken -- by the Department [**7] of Agriculture after the settlement, because any such actions necessarily would be beyond the scope of this case and its settlement. See Pigford v. Glickman, 185 F.R.D. 82, 92, 110-11 (D.D.C. 1999), aff'd, 340 U.S. App. D.C. 420, 206 F.3d 1212

(D.C. Cir. 2000) (class consisted only of **African**-American **farmers** discriminated against between January 1, 1983 and February 21, 1997, and consent decree did not provide mechanism to prevent future discrimination).

Similarly, the references by this Court and the court of appeals to conduct "bordering on malpractice," related only to counsel's failure "to meet critical consent decree deadlines," Memorandum Opinion and Order of April 27, 2001 at 5, deadlines required to be met *after* the Consent Decree was approved. Class Counsel ably litigated the case throughout its early stages, and they negotiated and entered into a fair settlement for the class as a whole. Indeed, this Court has noted just how remarkable Class Counsel's performance was at those early stages in vigorously litigating this case to the brink of trial and negotiating a landmark settlement with the government. See id. at 4-5 ("Class Counsel have earned accolades [**8] of acclaim for their efforts in initiating this case, litigating it to the verge of trial, and then negotiating a truly historic settlement with the government."). To the extent that the Court has been justifiably critical of Class Counsel, its concerns have related only to counsel's handling of the implementation process *after* entry of the Consent Decree. See id.; Pigford v. Veneman, 143 F. Supp. 2d 28 (D.D.C. 2001); Pigford v. Veneman, 148 F. Supp. 2d 31 (D.D.C. 2001). Class Counsel's failings in handling certain matters after entry of the Consent Decree cannot provide a basis for vacating the Consent Decree.

II. MOTION TO REMOVE LEAD CLASS COUNSEL

Removal of Class Counsel at this stage would be an extreme action that should not be taken lightly. Removal of counsel would be appropriate only if the Court were to find that it was absolutely necessary to preserve the integrity of the adversary process, as, for example, where an attorney's conflict of interest undermines the Court's confidence in the vigor of the attorney's representation of his or her client, or where the attorney is in a position to use privileged information concerning the other [**9] side as a result of prior representation. See Board of Education of the City of New York v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); see also Koller *ex rel.* Koller v. Richardson-Merrell, Inc., 237 U.S. App. D.C. 333, 737 F.2d 1038, 1055-56 (D.C. Cir. 1984), vacated on other grounds, 472 U.S. 424, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985); Ackerman v. National Property Analysts, Inc., 887 F. Supp. 510, 1993 WL 258679 (S.D.N.Y. 1993). Here, movants have presented no evidence of a conflict of interest or the potential misuse of privileged information by Class Counsel. Furthermore, the Court sees nothing that would be gained by the removal of Class Counsel now since this case already has reached the advanced stages of settlement implementation. See *In re* Barnett, 97 F.3d 181, 184 (7th Cir. 1996) [*100] (removal of class counsel improper where trial was almost concluded and nothing would be gained from expelling attorneys).

At the core of the criticisms voiced both by this Court and by the court of appeals was Class Counsel's repeated failure to meet deadlines for submission of claimant Petitions for Monitor Review, specifically the November 13, 2000 and May 15, 2001 deadlines. [**10] See Memorandum Opinion and Order of April 27, 2001 at 1-3, 5-6; Pigford v. Veneman, 292 F.3d at 920. Class Counsel's failure in this respect was significant, as evinced by this Court's imposition of sanctions and its framing of issues for a possible future hearing on sanctions. In fact, the Court considered the performance of Class Counsel with respect to the Monitor review process "dismal," their disregard of deadlines "brazen," and their explanation for this performance with respect to the Monitor Petition process unacceptable and evasive. Memorandum Opinion and Order of April 27, 2001 at 2-5.

Still, the practical impact of Class Counsel's failings was to threaten the government's enjoyment of the benefit of its bargain and to cost the government as much as an additional $ 33 million, not to deprive claimants of the right to Monitor review. See Memorandum Opinion and Order of April 27, 2001 at 6, n. 2. Ultimately, all the claimant Petitions subject to the November 13, 2000 deadline were either fully supported and deemed filed as of the original deadline or were withdrawn from the petition process as a result of substantive review by Class Counsel. n3 While [**11] the Court is aware of allegations that Class Counsel mishandled certain individual petitions, no such misconduct has been found by this Court or by the court of appeals, and movants' papers do not constitute a basis for making such a finding. As it has made clear in the past, the Court is fully prepared to impose sanctions on Class Counsel if the Court finds that Class Counsel "has shirked any of their responsibilities with respect to the filing of these materials and/ or withdrawals [of Petitions for Monitor Review]." Memorandum Opinion and Order of April 27, 2001 at 6. n4 No evidence or argument presently before this Court, however, warrants Class Counsel's removal.

n3 To ensure that claimants were not injured by Class Counsel's failure, the Court expressly required that each Petition be supported by "fully researched, fully briefed, fully documented materials." Memorandum Opinion and Order of April 27, 2001 at 6.

n4 See also Board of Education of the City of New York v. Nyquist, 590 F.2d at 1247 ("Since disqualification entails immediate disruption of the litigation, it is better to relegate any questions about [counsel's] conduct to other appropriate proceedings.")

[**12]

The efforts of Class Counsel have resulted in relief for thousands of **African**-American **farmers.** Although final decisions and awards have been made in thousands of individual claims, many claims remain to be finally determined and Class Counsel continues to make important contributions. None of the mistakes in the implementation process that have come to the attention of this Court and been discussed by the court of appeals warrants the removal of Class Counsel in the midst of the Consent Decree implementation process. For all of these reasons, it is hereby

ORDERED that the motion to vacate the Consent Decree [633] is DENIED; and it is

FURTHER ORDERED that the motion to remove lead Class Counsel [634] is DENIED.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 9-11-02

TIMOTHY PIGFORD, et al., Plaintiffs, v. ANN M. VENEMAN, Secretary, United States Department of Agriculture, Defendant. CECIL BREWINGTON, et al., Plaintiffs, v. ANN M. VENEMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 97-1978 (PLF), Civil Action No. 98-1693 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

144 F. Supp. 2d 16; 2001 U.S. Dist. LEXIS 5714

April 27, 2001, Decided
April 27, 2001, Filed

SUBSEQUENT HISTORY: Related proceeding at Wise v. Glickman, 2003 U.S. Dist. LEXIS 5033 (D.D.C., Mar. 31, 2003)

COUNSEL: [**1] For TIMOTHY C. PIGFORD, LLOYD SHAFER, GEORGE HALL, LEONARD COOPER, MCARTHUR NESBIT, plaintiffs (97-CV-1978): Jacob A. Stein, STEIN, MITCHELL & MEZINES, Washington, DC.

For TIMOTHY C. PIGFORD, LLOYD SHAFER, GEORGE HALL, ABRAHAM CARPENTER, plaintiffs (97-CV-1978): Alexander John Pires, Jr., CONLON, FRANTZ, PHELAN & PIRES, Washington, DC.

For TIMOTHY C. PIGFORD, LLOYD SHAFER, GEORGE HALL, plaintiffs (97-CV-1978): Richard Talbot Seymour, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP, New York, NY.

For LLOYD SHAFER, plaintiff (97-CV-1978): John Michael Clifford, Mona Lyons, CLIFFORD, LYONS & GARDE, Washington, DC.

For GEORGE HALL, plaintiff (97-CV-1978): Caroline Lewis Wolverton, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For LEONARD COOPER, plaintiff (97-CV-1978): Marcus B. Jimison, NCCU SCHOOL OF LAW, Land Loss Prevention Project, Stephon J. Bowens, Durham, NC.

For ABRAHAM CARPENTER, plaintiff (97-CV-1978): Phillip L Fraas, TUTTLE, TAYLOR & HERON, Washington, DC.

For MCARTHUR NESBIT, plaintiff (97-CV-1978): Alexander John Pires, Jr., [ILLEGIBLE WORDS].

For CECIL BREWINGTON, JERRY COOPER, ARTHUR GRIFFIN, CHARLIE H HARRIS, WILLIAM LAMPLEY, HENRY SIMMONS, WILLIE FRANK WHEELER, PAUL WINGARD, ROY G. WOOD, ARTHUR AMOS, RANSOM ARNOLD, CLARENCE POLK, HUBERT BROWN, CAROL JEAN BROWN, WILLIE HEAD, JR., ANDREW JACKSON, CLEM JONES, AARON MOBLEY, THEODORE F.B. BATES, WILBERT WALKER, JOHN M. DECOUDREAUX, ROY H. ADAMS, LARRY ALEXANDER, HERBERT C. ALLEN, JR., JAMES C. BACON, STANLEY BACON, W. E. BRANDON, JOSEPH BROWN, LEON E. BROWN, WILLIE J. BURNES, JOSPEH CARTHAN, MICHAEL V. CHATMAN, RONALD CLARKE, ALBERT J. COOPER, ANDREW L. COOPER, ELIJAH COLE, JR., HOUSTON COLEMAN, ROBERT COLEMAN, JIMMY L. CURRY, ALFORT DAVIS, ADELL DAVIS, SR., HAROLD L. DAVIS, ONZIE GLEN, MARQUIS GRANT, WILLIAM HAMKLIN, THETIS HARDY, GEORGE HENDERSON, CARY HOLMES, MARK A. HOUSTON, LEE ANDREW HOWARD, OLLIE HUDSON, TOBIAS JENKINS, GARRETT JOHNSON, SAMMY JOHNSON, WILLIE JOHNSON, FREDDIE JONES, COLONEL, WILLIE E. LANE, JAMES MADLOCK, ANDRE MATHEWS, KENZIE MCGINNIS, CURTIS MILLER, TED MILLER, JESSIE

MOORE, ROGERS B. MORRIS, CARL PERRY, JAMES W. PIGGS, EDDIE REED, JAMES SANDER, MATTIE SANDERS, WILLIE E. SIAS, OLIVER SHORT, EDWARD SMITH, VERNON SMITH, W. C. SPENCER, JR., MCARTHUR STRAUGHTER, JOHNNIE THOMAS, HARRY P. THURMOND, WILLIAM WATKINS, BOBBY WELLS, MICHAEL A. WHITE, CARL WHITTINGTON, CLEOTHA WILLIAMS, HERBERT WILLIAMS, JOHN A. WILLIAMS, JR., ROBERT WILLIAMS, SUSIE L. CROFT, RAPHAEL L. WILLIAMS, SANDERS WILLIAMS, FREDDIE L. WINTERS, PERRY WOODS, WILLIE RICHARDSON, GRETHEL RICHARDSON, ERIC RICHARDSON, DIONYSIA RICHARDSON-SMITH, GARON TRAWICK, PHILLIP R. BARKER, CHENAY COSTON, PERCY DAVIS, SHEILA W. HARVEY, EDISON LAMONT SMITH, JR., LARRY R. WHITT, LAWRENCE L. BRECKENRIDGE, GEORGE C. ROBERTS, JR., ENOCH EDWARDS, JR., HEZEKIAH GIBSON, WALTER GORE, THEODORE HOUGH, ANDREW B. JOHNSON, CHARLIE C/O SANDRA MACK KELLY, WALTER C/O LUCY IBEMERE, DAVID E. BOYD, TOM GARY EWELL, ROBERT H. TAYLOR, JACK TYUS, JAMES JENKINS, KIRK A. BENOIT, ABERRA BULBULLA, CARL CHRISTOPHER, DENNIS CONNELL, BENJAMIN JACOBS-EL, VANNICO HANNEY, ALPHONSO L. JAMES, SAMUEL MOORE, JOAN NELSON, DELROY A. PETERSON, MARTIN REYNOLDS, WAYNE M. SMITH, LEONA WATSON, CURNEALL WATSON, GAIL CHIANG, JAMES B. BEVERLY, JR., MACIO HILL, MASHELIA GRANDISON-KIZZIE, WEST BONES, JR., ALICE DAVIS, CLINTON F. JOHNSON, JR., ALL PLAINTIFFS, plaintiffs (98-CV-1693): Phillip L Fraas, TUTTLE, TAYLOR & HERON, Alexander John Pires, Jr., CONLON, FRANTZ, PHELAN & PIRES, Washington, DC.

For HOUSTON BLAKENEY, REATHA BLAKENEY, LEROY ROBINSON, BOBBI NEWTON, PEARLIE PETERSON, NAOMI KNOCKETT, ILENTHE PORTER, JAMES DAVIS, petitioners (97-CV-1978): Stephen J. Bowens, Durham, NC.

For DAN GLICKMAN, federal defendant (97-CV-1978): Daniel Edward Bensing, U.S. ATTORNEY'S OFFICE, Susan Hall Lennon, Amanda Quester, U.S. DEPARTMENT OF JUSTICE, David Monro Souders, WEINER BRODSKY SIDMAN & KIDER, PC, Washington, DC.

For DAN GLICKMAN, ANN M. VENEMAN, federal defendants (97-CV-1978): Terry M. Henry, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For DAN GLICKMAN, federal defendant (97-CV-1978, 98-CV-1693): Michael Sitcov, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For ANN M. VENEMAN, federal defendant (97-CV-1978): Michael Sitcov, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For BANKS LAW FIRM, Non Party (97-CV-1978): Wyndell Oliver Banks, Washington, DC.

RANDI ILYSE ROTH, Non Party (97-CV-1978), Pro se, St. Paul, MN.

EVANS M. FOLINS, claimant (97-CV-1978), Pro se, Los Valoros, CA.

For SARAH DAVIS, movant (97-CV-1978): Dennis Charles Sweet, LANSTON, FRAZER, SWEET & FREESE, Jackson, MS.

For JAMES TANNER, movant (97-CV-1978): Ford C Ladd, Alexandria, VA.

JUDGES: PAUL L. FRIEDMAN, United States District Judge.

OPINIONBY: PAUL L. FRIEDMAN

OPINION:

[*17] MEMORANDUM OPINION AND ORDER

On April 19, 2001, the Court held a status conference because of its concern about Class Counsel's repeated failures to meet court-ordered deadlines relating to Petitions for Monitor Review. The history of the petition process and counsel's past failures in meeting petition deadlines is set out in previous Court orders and will not be repeated here. See Order of Reference P 8 (April 4, 2000) (establishing procedure); Stipulation and Order P 5 (July 14, 2000) (establishing deadlines); Order of Nov. 8, 2000 (discussing Class Counsel's failures and modifying deadlines); Order of April 6, 2001 (recounting Class Counsel's continued failures to meet deadlines).

In particular, the Court was alarmed by Class Counsel's consistent failure to meet a modified schedule for filing petition materials that was established the last time counsel sought emergency relief from the deadlines. As reports from the Monitor demonstrate, Class Counsel failed to meet the minimum quota of 400 filings per month in any of the past four months. See Monitor Report for Period Ending Dec. 15, 2000 (showing [**2] that Class Counsel filed materials or withdrawals with respect to 399 claimants); Monitor Report for Period

Ending Jan. 15, 2001 (showing filings with respect to only 315 claimants); Monitor Report for Period Ending Feb. 15, 2001 (showing filings with respect to only 282 claimants); Monitor Report for Period Ending March 15, 2001 (showing filings with respect to only 180 claimants). At the April 19 status conference, the Monitor reported that there were still up to 2,064 petitions yet to be filed by Class Counsel before the May 15 deadline.

Class Counsel's performance with respect to the Petition for Monitor Review process has been dismal. Despite signing a stipulation with the government in which they agreed to file a sizable yet finite number of petitions by November 13, 2000, and despite promising not to seek an extension of that deadline, Class Counsel sought equitable relief from the Court mere days before the deadline expired. See Plaintiffs' Expedited Motion for a Hearing to Resolve Problems with Track A Petition for Monitor Review Process (Oct. 31, 2000). Agreeing with Class Counsel's entreaty to spare the class from the consequences of counsel's admitted failures, the [**3] Court permitted what amounted to a six-month extension of the deadline over the vehement objection of [*18] the government. As the Monitor's reports make clear, Class Counsel completely failed to take advantage of this extension, never meeting any of the monthly minimum requirements set by the Court.

At the April 19 status conference, Class Counsel made the remarkable admission that they never had a realistic expectation of meeting the November 13, 2000, deadline they had negotiated with the government, nor did they have any intention of meeting the modified May 15, 2001, deadline set by the Court. With respect to the initial deadline, Class Counsel conceded that they considered the November 13 deadline a "best estimate" of when they could complete more than 4000 Petitions for Monitor Review. With respect to the May 15 deadline, Class Counsel suggested that they never intended to meet the monthly quota of 400 petitions necessary to meet the deadline; instead they planned from the beginning to file between 350 and 400 petitions a month, then request an extension of time for the 500 or 600 petitions remaining when the deadline came. n1

> n1 Class Counsel gave no real explanation for their inability or unwillingness to marshal their resources in a way that would ensure that all petitions would be filed in a timely manner. The Court is left to wonder whether Class Counsel would be in the position in which they now find themselves had they not filed and pursued three new sister class actions in this Court at the same time they were attempting to complete their obligations in this case. See Love v. Veneman, Civil Action No. 00-2502 (JR); Garcia v. Veneman, Civil Action No. 00-2445 (LFO); Keepseagle v. Veneman, Civil Action No. 99-3119 (WBB). Considering the significant amount of work left to be done in this case, the Court will informally confer with the judges to whom the Love, Garcia and Keepseagle cases have been assigned to determine whether those cases should be indefinitely stayed until Class Counsel can prove that they are able to manage even one class action, let alone four.

[**4]

Equally remarkable, Class Counsel attempted to place blame for their lack of foresight and planning on everyone other than themselves. Counsel suggested that they were hindered by the Monitor's allegedly slow pace in deciding the first batch of Petitions for Monitor Review, by the government's alleged unwillingness to settle a dispute over attorneys' fees (with the alleged intent of sabotaging Class Counsel by depriving them of funds necessary to complete their obligations in this case), and even by the Court, who was purportedly just "wrong" when it decided against Class Counsel with respect to certain legal issues relating to their motion for attorneys' fees.

In an apparent attempt to further shift the blame from themselves to others, Class Counsel presented the Court with three options for resolving the instant deadline debacle: (1) the Court could grant Class Counsel another blanket extension of the deadlines so that they can file complete, thorough Petitions for Monitor Review; (2) the Court could allow counsel to file two-page informational petitions with the Monitor by the deadline, to be followed by complete petitions at some time in the future beyond the deadline; or (3) [**5] the Court could enforce the May 15 deadline and force the Monitor to accept what Class Counsel admits would be incomplete, inadequate petitions -- to the acknowledged detriment of their clients. These are not real options. Class Counsel in effect asks for an indefinite extension of time so that they can complete what should have been completed six months ago (the first or second option) or, in the alternative, dares the Court to enforce the deadline (the third option) and be the cause of Class Counsel filing petitions that are substandard and likely to be rejected by the Monitor.

Class Counsel have earned accolades and acclaim for their efforts in initiating [*19] this case, litigating it to the verge of trial, and then negotiating a truly historic settlement with the government. By negotiating the Consent Decree that settled this case, Class Counsel benefitted tens of thousands of **African** American

farmers claiming racial discrimination who otherwise would have remained mute and had no opportunity to obtain redress. Counsel's negligent handling of the final stages of this case, however, runs the risk of jeopardizing counsel's prior accomplishments. Class Counsel's miscalculations, left [**6] unremedied, could mean that literally thousands of **farmers** with possibly meritorious claims will be left without recourse due solely to counsel's myopia; counsel's conduct borders on legal malpractice. The brazenness with which Class Counsel have disregarded the deadlines first established in the Stipulation and Order they negotiated with the government and then modified by the Court's Order of November 8, 2000, appears to be the result of counsel's impression that no matter how poorly they perform their obligations, the Court would never let their failings adversely affect the class and would always come to the rescue.

Recognizing its obligation to ensure that the Consent Decree and subsequent orders are enforced in a manner commensurate with both the letter and the spirit of the parties' agreements and the Court's orders, the Court is still considering whether to exercise its equitable powers and grant an extension of time for the filing of Petitions of Monitor Review. Regardless of its decision, Class Counsel will be held accountable for their actions. If the Court ultimately decides to grant an extension beyond May 15, 2001, it will impose a progressive schedule of fines against [**7] Class Counsel for breaching their agreement with the government, memorialized in the Court's Stipulation and Order of July 14, 2000, and for deliberately violating the Court's Order of November 8, 2000. n2

n2 As part of the bargain struck between the parties and approved by the Court in the Order of July 14, 2000, Class Counsel agreed to meet the 120 day deadline in return for the government's agreement to admit more than 1,100 Track A claimants into the class who otherwise would have been excluded. Based on the current success rate of roughly 60% and a cash award of $ 50,000 per claimant, this means that the agreement will cost the government *at least* $ 33 million in damages alone -- not to mention the cost of providing debt relief for those same claimants, as well as the financial and personnel drain on the Departments of Agriculture and Justice. While the schedule of fees outlined below, if implemented, would not fully recompense the government for Class Counsel's flagrant breach of the agreement, it would provide at least a degree of compensation.

[**8]

Furthermore, the Court will not permit Class Counsel to file two-page "informational" petitions, as proposed by counsel at the status conference. Class Counsel is obligated to provide full, fair and adequate representation for all of their clients, not just those who were lucky enough to be at the top of counsel's list ten months ago when they first negotiated the deadlines. Counsel shall file fully researched, fully briefed, fully documented materials in support of all remaining Petitions for Monitor Review, or withdrawals of those petitions, where appropriate. If the Court determines at a later date that Counsel has shirked any of their responsibilities with respect to the filing of these materials and/or withdrawals, the Court will impose fines and sanctions beyond those outlined below.

Finally, it is clear to the Court that Class Counsel will be unable to meet their obligations, even with an extension of time, without the assistance of additional counsel. The Court is encouraged by Class Counsel's belated acknowledgment at the April 19 status conference that they would need to rely on outside counsel -- preferably [*20] *pro bono* counsel -- to assist with the filing of Petitions [**9] for Monitor Review after proper training. The Court also supports Class Counsel's attempts to find *pro bono* counsel to assist with the representation of Track B claimants. Such assistance would undoubtedly result in Class Counsel having more time to concentrate on Petitions for Monitor Review, something to this point they have not been able or willing to do.

To this end, Class Counsel, the Monitor and/or the Court have spoken with several individuals -- including Robert N. Weiner of Arnold & Porter, chair of the ABA Committee on Pro Bono and Public Services, Susan Hoffman of Crowell & Moring, and Steven B. Scudder, the ABA Committee's staff person -- who might be able to assemble a team of *pro bono* lawyers to assist Class Counsel on an emergency basis. The Court understands that Class Counsel have arranged a meeting on May 1, 2001, with Mr. Weiner, Ms. Hoffman, Mr. Scudder and representatives from District of Columbia law firms who might be willing to assist in dealing with the crisis. The Court is considering whether to ask the Monitor to attend this meeting, as well.

Upon consideration of the foregoing, it is hereby

ORDERED that all deadlines set forth in the Court's Order [**10] of November 8, 2000, are suspended until further order of the Court; it is

FURTHER ORDERED that if the Court ultimately decides to grant an extension of time beyond May 15, 2001, it will impose a progressive schedule of fines

against Class Counsel. After all petitions on Class Counsel's Register of Petitions have been supplemented or withdrawn, Class Counsel will be fined for each day after May 15, 2001, that their obligation was not complete. Class Counsel will be fined $ 1,000 for each day during the first month after the deadline that all supporting materials or withdrawals were not filed, they will be fined $ 2,000 for each day during the second month after the deadline that all supporting materials or withdrawals were not filed, they will be fined $ 3,000 for each day during the third month after the deadline that all that all supporting materials or withdrawals were not filed, and so on. Fines collected from Class Counsel will be placed in the Court Registry until such time as the Court rules on a proper motion for attorneys' fees or when the parties settle the current attorneys' fees dispute; at such time the Court will order that all funds in the Registry be paid to the government; [**11] and it is

FURTHER ORDERED that if after meeting on May 1, 2001, Class Counsel determine that an extension of time beyond the May 15, 2001, deadline will be needed to complete the petition process in a professional manner, counsel shall file a motion seeking such an extension. The motion shall propose a realistic schedule for completing the petition process and shall provide the details of any plan to incorporate additional counsel (including an explanation of how such counsel would be trained and precisely how they would be utilized). If such a motion is necessary, it shall be filed and hand delivered to Chambers and government counsel by May 4, 2001, at 4:00 p.m.; a response from the government, if any, shall be filed and hand delivered to Chambers and Class Counsel by May 8, 2001, at 4:00 p.m.

SO ORDERED.

for PAUL L. FRIEDMAN

United States District Judge

DATE: April 27, 2001

TIMOTHY PIGFORD, et al., Plaintiffs, v. DAN GLICKMAN, Secretary, United States Department of Agriculture, Defendant. CECIL BREWINGTON, et al., Plaintiffs, v. DAN GLICKMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 97-1978 (PLF), Civil Action No. 98-1693 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

127 F. Supp. 2d 35; 2001 U.S. Dist. LEXIS 140

January 3, 2001, Decided
January 4, 2001, Opinion Filed

DISPOSITION: [**1] Certain individual plaintiffs' motion to reconsider fairness of Consent Decree [248-1] DENIED.

LexisNexis(R) Headnotes

COUNSEL: For TIMOTHY C. PIGFORD, LLOYD SHAFER, GEORGE HALL, MCARTHUR NESBIT, EDDIE SLAUGHTER, LEO JACKSON, J. B. BLACK, LUCIOUS ABRAMS, JR., GRIFFIN TOOD, SR., GREGORY ERVES, CECIL BREWINGTON, HERBERT L. SKINNER, JR., OBIE L. BEAL, CLIFFORD LOVETT, plaintiffs: Jacob A. Stein, STEIN, MITCHELL & MEZINES, Alexander John Pires, Jr., CONLON, FRANTZ, PHELAN & PIRES, Richard Talbot Seymour, LAWYERS' COMMITTEE FOR CIVIL RIGHTS, Washington, DC.

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For LEONARD COOPER, plaintiff: Marcus B. Jimison, NCCU SCHOOL OF LAW, Land Loss Prevention Project, Stephon J. Bowens, Durham, NC.

For CECIL BREWINGTON, JERRY COOPER, ARTHUR GRIFFIN, CHARLIE H HARRIS, WILLIAM LAMPLEY, HENRY SIMMONS, WILLIE FRANK WHEELER, PAUL WINGARD, ROY G. WOOD, ARTHUR AMOS, RANSOM ARNOLD, CLARENCE POLK, HUBERT BROWN, CAROL JEAN BROWN, WILLIE HEAD, JR., ANDREW JACKSON, CLEM JONES, AARON MOBLEY, THEODORE F.B. BATES, WILBERT WALKER, JOHN M. DECOUDREAUX, ROY H. ADAMS, LARRY ALEXANDER, HERBERT C. ALLEN, JR., JAMES C. BACON, STANLEY BACON, W. E. BRANDON, JOSEPH BROWN, LEON E. BROWN, WILLIE J. BURNES, JOSPEH CARTHAN, MICHAEL V. CHATMAN, RONALD CLARKE, ALBERT J. COOPER, ANDREW L. COOPER, ELIJAH COLE, JR., HOUSTON COLEMAN, ROBERT COLEMAN, JIMMY L. CURRY, ALFORT DAVIS, ADELL DAVIS, SR., HAROLD L. DAVIS, ONZIE GLEN, MARQUIS GRANT, WILLIAM HAMKLIN, THETIS HARDY, GEORGE HENDERSON, CARY HOLMES, MARK A. HOUSTON, LEE ANDREW HOWARD, OLLIE HUDSON, TOBIAS JENKINS, GARRETT JOHNSON, SAMMY JOHNSON, WILLIE JOHNSON, FREDDIE JONES, COLONEL, WILLIE E. LANE, JAMES MADLOCK, ANDRE MATHEWS, KENZIE MCGINNIS, CURTIS MILLER, TED MILLER, JESSIE MOORE, ROGERS B. MORRIS, CARL PERRY, JAMES W. PIGGS, EDDIE REED, JAMES SANDER, MATTIE SANDERS, WILLIE E. SIAS, OLIVER SHORT, EDWARD SMITH, VERNON SMITH, W. C. SPENCER, JR., MCARTHUR STRAUGHTER,

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For DAN GLICKMAN, federal defendant: Daniel Edward Bensing, U.S. ATTORNEY'S OFFICE, Terry M. Henry, Susan Hall Lennon, Amanda Quester, Michael Sitcov, U.S. DEPARTMENT OF JUSTICE, David Monro Souders, WEINER BRODSKY SIDMAN & KIDER, PC, Washington, DC.

For DAN GLICKMAN, federal defendant (98-CV-1693): Michael Sitcov, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For BANKS LAW FIRM, Non Party: Wyndell Oliver Banks, Washington, DC.

RANDI ILYSE ROTH, Non Party, Pro se, St. Paul, MN.

EVANS M. FOLINS, claimant, Pro se, Los Valoros, CA.

For SARAH DAVIS, movant: Dennis Charles Sweet, LANSTON, FRAZER, SWEET & FREESE, Jackson, MS.

For ANTONIO SANTOS, CLINTON R. MARTIN, movants: Gerard Robert Lear, Arlington, VA.

JUDGES: PAUL L. FRIEDMAN, United States District Judge.

OPINIONBY: PAUL L. FRIEDMAN

OPINION: [*36]

MEMORANDUM OPINION AND ORDER

The Court has before it the motion of certain individual plaintiffs to reconsider the fairness of the Consent Decree approved by this Court on April 14, 1999, defendant's opposition, Class Counsel's response, and movants' reply to defendant's and Class Counsel's arguments. The Court heard oral argument on the motion and permitted movants and the defendant to file supplemental memoranda. Upon consideration of the pre-and post-hearing memoranda and the arguments of counsel, the Court will deny the motion. [*37]

I. BACKGROUND

On January 5, 1999, the parties filed a proposed Consent Decree which, if approved by the Court, would settle this case and establish a process for adjudicating claims by individual **African** American **farmers** who claimed that the United States Department of Agriculture had discriminated against them on [**2] the basis of their race when, among other things, it denied their applications for credit and/or benefit programs. After granting preliminary approval of the settlement, the Court conducted an extensive fairness hearing on March 2, 1999. On April 14, 1999, the Court gave final approval to the Consent Decree, finding that it represented a fair, reasonable and adequate resolution of the class members' claims under Rule 23(e) of the Federal Rules of Civil Procedure. See Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999)

Shortly after the Court approved the Decree, seven individual putative class members appealed the Court's order approving the Consent Decree to the court of appeals, arguing that the Decree was unfair in certain respects and should be set aside. Appellants' arguments were considered and summarily rejected by the court of appeals. See Pigford v. Glickman, 340 U.S. App. D.C. 420, 206 F.3d 1212 (D.C. Cir. 2000), *aff'g* Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999). While the

appeal was pending, the same seven appellants/movants filed the instant motion asking this Court to reconsider the fairness of the Consent Decree [**3] in light of "changed circumstances" which, they argue, justify vacating the Decree and scheduling this case for trial.

II. DISCUSSION

Movants have asked the Court to reconsider the fairness of the Consent Decree under Rule 60(b)(5) of the Federal Rules of Civil Procedure. n1 Rule 60(b)(5) permits a court to "relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . [if] it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5), Fed. R. Civ. P; see Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378-83, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992) (applying Rule 60(b) to request for modification of consent decree); United States v. Western Elec. Co., 310 U.S. App. D.C. 281, 46 F.3d 1198, 1203 (D.C. Cir. 1995) (applying Rufo analysis to request under Rule 60(b)(5) to modify consent decree).

n1 Movants also seek relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Rule 60(b)(6) permits a court to relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6), Fed. R. Civ. P. The phrase "other reason," however, consistently has been interpreted by the courts to mean reasons *other than* those specified in subsections (1) through (5) of Rule 60(b). See Baltia Airlines, Inc. v. Transaction Management, Inc., 321 U.S. App. D.C. 191, 98 F.3d 640, 642 (D.C. Cir. 1996) (citing Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 258 U.S. App. D.C. 124, 810 F.2d 243 (D.C. Cir. 1987)). By its plain terms, therefore, Rule 60(b)(6) does not apply in this case because movants have sought relief under one of the other provision of Rule 60(b). The Court therefore will focus only on whether it should reconsider its ruling under Rule 60(b)(5) of the Federal Rules.

[**4]

A party seeking modification of a consent decree under Rule 60(b)(5) "must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances." Rufo v. Inmates of Suffolk County Jail, 502 U.S. at 377; see NLRB v. Harris Teeter Supermarkets, 342 U.S. App. D.C. 32, 215 F.3d 32, 35 (D.C. Cir. 2000). To succeed on their motion in this case, movants must demonstrate that events or changed facts (1) "make compliance with the decree substantially more onerous"; (2) make the decree "unworkable because of unforeseen obstacles"; or (3) make "enforcement [of the decree] detrimental to the public interest." Rufo v. Inmates of Suffolk County Jail, 502 U.S. at 384; NLRB v. Harris Teeter Supermarkets, 215 F.3d [*38] at 35. Movants meet none of these three tests.

In their original motion for reconsideration, movants cited several examples of "changed circumstances" regarding the Track A claims process that allegedly constituted sufficient justifications for either setting aside the Consent Decree in its entirety or modifying it in unspecified ways. Many of [**5] the issues raised in the motion, however, were resolved or had become moot by the time the Court heard oral argument on the motion. n2 Accordingly, movants' supplemental hearing memorandum narrowed the alleged changed circumstances to only those still outstanding at the time of oral argument, and the Court therefore focuses only on those issues.

n2 For example, questions regarding the standard the Monitor should use to evaluate Petitions for Monitor Review and whether claimants are able to supplement the record when filing their Petitions were resolved by the Order of Reference, which appointed Randi Roth as the Monitor and clarified her duties and powers. See Order of Reference, Apr. 4, 2000, at P 8(e). In addition, uncertainty regarding the rules that apply to late-filed claims has been resolved by Court order, see Stipulation and Order, July 14, 2000, as has the issue of attorneys' fees for counsel other than Class Counsel and Of Counsel. See Memorandum Opinion and Order, Aug. 28, 2000. Certain other arguments made by these same movants throughout this litigation were considered and rejected by the D.C. Circuit in Pigford v. Glickman, 340 U.S. App. D.C. 420, 206 F.3d 1212 (D.C. Cir. 2000), *aff'g* Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999).

[**6]

The majority of the issues raised by movants are essentially complaints regarding the manner in which adjudicators have been deciding Track A claims. Movants believe that an unacceptably high rate of Track A claims are being denied; that too few **farmers** are receiving debt relief; that adjudicators are deciding claims in an arbitrary and capricious manner; that adjudicators have a tendency to resolve factual disputes against class members; and that adjudicators have in

certain cases accepted false and possibly perjurious information submitted by the government.

These arguments are not properly before the Court. Even if the Court were presented with evidence sufficient to support movants' claims -- and it has not been -- it would still decline to act on those claims at this time. As the Consent Decree and the Order of Reference make very clear, disputes regarding decisions by arbitrators should be brought to the attention of the Monitor through a Petition for Monitor Review. See Consent Decree PP 9(b)(v), 12(b)(iii); Order of Reference P 8. Such complaints regarding the outcome of individual Track A adjudications do not constitute changed circumstances within the meaning of Rule [**7] 60(b)(5). The parties settled this case on the premise that such complaints, at least as an initial matter, would be referred to the Monitor, not the Court.

Movants also suggest that Class Counsel's use of non-lawyers to assist class members fill out their claims packages and Class Counsel's alleged inability to provide comprehensive information regarding similarly-situated white **farmers** to Track A claimants constitute changed circumstances justifying substantial modification or vacation of the Consent Decree. Movants' arguments ignore the reality of this case and are without merit.

The size of the class, which the parties originally estimated would reach 2,000 **farmers,** quickly ballooned to more than 21,000 **farmers.** In light of this enormous and unforeseen expansion of the class, and considering the relative unwillingness of lawyers other than Class Counsel and Of Counsel to assist class members, it is difficult to fathom how movants can argue that Class Counsel's decision to use non-lawyer assistants constitutes changed circumstances and somehow harms the class. Faced with the need to assist a class more than 10 times larger than expected, Class Counsel made a wise decision: rather [**8] than tell potential class members that they [*39] could not participate in this case because there were not enough lawyers to assist each and every one of them with every aspect of the filing of their claims, Class Counsel chose to allow non-lawyers to assist some class members to assemble their claim packages, so long as an attorney ultimately reviewed and signed each claim before it was filed (as required by the Consent Decree). See Consent Decree P 5(e).

With respect to movants' argument that the Consent Decree should be vacated because Class Counsel has been unable to assist a sufficient number of claimants to identify a similarly-situated white **farmer** (which is critical to success in a Track A claim), the Court again finds that movants' assertion, even if true, does not make the Consent Decree unfair. At the hearing on this motion, Class Counsel admitted that it has failed to identify as many similarly situated white **farmers** as it had anticipated (largely due to the increased class size), but noted that it expects to identify many more before filing Petitions for Monitor Review with respect to those Track A claims that were denied due to Class Counsel's admitted failures. Movants' [**9] suggestion that Class Counsel's shortcomings have so injured the chances of class members to ultimately prevail on their claims that the Consent Decree has become inherently unfair is without merit. In light of the fact that many Track A claims have not yet been decided and that the Monitor has yet to determine whether any of these allegedly injured claimants will get a "second chance" on reconsideration, this argument is premature.

The remainder of movants' arguments revolve around their apparent misunderstanding regarding the manner in which the Consent Decree has been implemented by Class Counsel and government counsel. Movants suggest that the two have colluded on several occasions to make decisions that adversely affect the class without first giving notice to and receiving the consent of the class. Movants cite two specific examples of such alleged "material modifications" that have been made to the Consent Decree without consent from the class: the alteration of the government's deadline for responding to Track A claims; and modification to the definition of "class member" that allegedly reduces the number of **farmers** who might obtain relief under the Consent Decree.

Movants [**10] first suggest that the parties' decision to enlarge the time within which the government has to respond to Track A claims violated class members' rights to due process under the Fifth Amendment and warrants setting aside the Consent Decree. In reality, however, the parties and the Court simply came to an agreement that a temporary extension of time for the government to respond in a relatively small number of cases was appropriate and necessary, particularly in light of the exponentially increased class size. The extension was not a material modification of the Consent Decree and has had only the most minor impact on claimants. In fact, the negative impact on the class would have been much more substantial if the parties had sought and the Court had required that the entire Track A claims process be halted for months while the parties notified and obtained the consent of the class on such a minor issue.

Movants also argue that the parties made a material modification to the Consent Decree that substantially harmed the class when they failed to consult all class members before deciding to consider **farmers** who attempted to apply, in addition to those who actually applied, as part of [**11] the class in this case (referred

to by the parties as the "constructive application" principle). Movants misunderstand the motivation behind and the impact of this decision. The constructive application principle, which was fully agreed to by the parties, actually expanded the scope of the class beyond the plain language of the Consent Decree and made more **farmers** eligible for relief. While the language of the Decree limits the class to "**African** [*40] American **farmers** who . . . *applied* to the United States Department of Agriculture . . . for participation in a federal farm credit or benefit program," Consent Decree P 2(a) (emphasis added), the constructive application principle extends possible relief in this case to those who *attempted to apply* as well, so long as certain requirements are met. Such an agreed-upon interpretation of the Consent Decree is not a change of circumstances that operates to the detriment of claimants; it is a reading that substantially broadens the scope of the class, is highly favorable to the claimants, and is completely in line with the parties' and the Court's expectation that the Consent Decree would be liberally construed to the benefit of **African** [**12] American **farmers.** See Consent Decree, Apr. 14, 1999, at 1-2 ("In light of the remedial purposes of this Consent Decree, the parties intend that it be liberally construed to effectuate those purposes in a manner that is consistent with the law.").

III. CONCLUSION

As Class Counsel, government counsel and movants' counsel all note in their briefs, the Consent Decree approved by the Court on April 14, 1999, is a grand, historical first step toward righting the wrongs visited upon thousands of **African** American **farmers** for decades by the United States Department of Agriculture. In the 20 months since the settlement was approved, more than 11,000 **African** American **farmers** have filed successful claims for relief and have received monetary compensation and/or debt relief totaling more than $ 500,000,000. This motion, brought on behalf of seven **farmers** out of the class of more than 21,000, seeks to obliterate this achievement and the possibility that thousands of additional **farmers** will receive additional millions of dollars by having the Court vacate the Consent Decree. Such an action would not only mean that the thousands of hours and hundreds of millions of dollars spent to this point [**13] administering the Decree would all be for naught, but also would mean that the thousands of **farmers** who have already prevailed on their claims would be forced to return their monetary awards to the government and would have to reassume the debt of which they just recently were relieved. Movants have failed to demonstrate that there are any changed circumstances that justify modifying or vacating the Consent Decree. Accordingly, it is hereby

ORDERED that certain individual plaintiffs' motion to reconsider the fairness of the Consent Decree [248-1] is DENIED.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 1/3/01

TIMOTHY PIGFORD, et al., Plaintiffs, v. DAN GLICKMAN, Secretary, United States Department of Agriculture, Defendant. CECIL BREWINGTON, et al., Plaintiffs, v. DAN GLICKMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 97-1978 (PLF), Civil Action No. 98-1693 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

185 F.R.D. 82; 1999 U.S. Dist. LEXIS 5220

April 14, 1999, Decided
April 14, 1999, Filed

DISPOSITION: [**1] Consent Decree approved and entered.

LexisNexis(R) Headnotes

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For Defendant: Michael Sitcov, Philip Bartz, U.S. Dept. Of Justice, Washington, DC.

JUDGES: PAUL L. FRIEDMAN, United States District Judge.

OPINIONBY: PAUL L. FRIEDMAN

OPINION:

[*85] OPINION

Forty acres and a mule. As the Civil War drew to a close, the United States government created the Freedmen's Bureau to provide assistance to former slaves. The government promised to sell or lease to **farmers** parcels of unoccupied land and land that had been confiscated by the Union during the war, and it promised the loan of a federal government mule to plow that land. Some **African** Americans took advantage of these programs and either bought or leased parcels of land. During Reconstruction, however, President Andrew Johnson vetoed a bill to enlarge the powers and activities of the Freedmen's Bureau, and he reversed many of the policies of the Bureau. Much of the promised land that had been leased to **African** American **farmers** was taken away and returned to Confederate loyalists. For most **African** Americans, the promise of forty [**2] acres and a mule was never kept. Despite the government's failure to live up to its promise, **African** American **farmers** persevered. By 1910, they had acquired approximately 16 million acres of farmland. By 1920, there were 925,000 **African** American farms in the United States.

On May 15, 1862, as Congress was debating the issue of providing land for freed former slaves, the United States Department of Agriculture was created. The statute creating the Department charged it with acquiring and preserving "all information concerning agriculture" and collecting "new and valuable seeds and plants; to test, by cultivation, the value of such of them as may require such tests; to propagate such as may be worthy of propagation, and to distribute them among agriculturists." An Act to establish a Department of Agriculture, ch. 71, 12 Stat. 387 (1862). In 1889, the Department of Agriculture achieved full cabinet department status. Today, it has an annual budget of $ 67.5 billion and administers farm loans and guarantees worth $ 2.8 billion.

As the Department of Agriculture has grown, the number of **African** American **farmers** has declined dramatically. Today, there are fewer than 18,000 **African** American [**3] farms in the United States, and **African** American **farmers** now own less then 3 million acres of land. The United States Department of Agriculture and the county commissioners to whom it has delegated so much power bear much of the responsibility for this dramatic decline. The Department

itself has recognized that there has always been a disconnect between what President Lincoln envisioned as "the people's department," serving all of the people, and the widespread belief that the Department is "the last plantation," a department "perceived as playing a key role in what some see as a conspiracy to force minority and disadvantaged **farmers** off their land through discriminatory loan practices." See Pls' Motion for Class Certification, Exh. B, Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team (Feb. 1997) ("CRAT Report") at 2.

For decades, despite its promise that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial [**4] assistance from the Department of Agriculture," 7 C.F.R. § 15.1, the Department of Agriculture and the county commissioners discriminated against **African** American **farmers** when they denied, delayed or otherwise frustrated the applications of those **farmers** for farm loans and other credit and benefit programs. Further compounding the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination. These events were the culmination of a string of broken promises that had been made to **African** American **farmers** for well over a century.

It is difficult to resist the impulse to try to undo all the broken promises and years of discrimination that have led to the precipitous decline in the number of **African** American **farmers** in the United States. The Court has before it a proposed settlement of a class action lawsuit that will not undo all that has been done. Despite that fact, however, the Court finds that the settlement is a fair resolution of the claims brought in this case [*86] and a good first step towards assuring that the kind of discrimination that has been visited on **African** American **farmers** since Reconstruction will [**5] not continue into the next century. The Court therefore will approve the settlement.

I. BACKGROUND OF THE CASE

The plaintiffs in this case allege (1) that the United States Department of Agriculture ("USDA") willfully discriminated against them and other similarly situated **African** American **farmers** on the basis of their race when it denied their applications for credit and/or benefit programs or delayed processing their applications, and (2) that when plaintiffs filed complaints of discrimination with the USDA, the USDA failed properly to investigate and resolve those complaints. See Seventh Amended Complaint at 4-5. Plaintiffs allege that defendant's actions violated a number of statutes and the Constitution, but both sides agree that this case essentially is brought under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 ("ECOA"). See Transcript of Hearing of March 2, 1999, at 19. n1

n1 Most of the class members are complaining about racial discrimination in the USDA's credit programs. ECOA provides the statutory basis for claims of discrimination in credit transactions. See 15 U.S.C. § 1691. A small number of class members, approximately 5% of the class, complain about the USDA's administration of its benefit programs, especially its disaster relief programs. See Seventh Amended Complaint at P 76. The benefit programs are not subject to ECOA, and the claims against the USDA for alleged acts of discrimination in these programs are brought under the Administrative Procedure Act, 5 U.S.C. § 706. The differences between the two types of claims lead to slight variations in the burdens of proof and the relief provided.

[**6]

The Court certified this case as a class action on October 9, 1998, and preliminarily approved a Consent Decree on January 5, 1999. After a hearing held on March 2, 1999, the parties made some revisions to the proposed Consent Decree and filed a revised proposed Consent Decree with the Court on March 19, 1999. The Court now concludes that the revised proposed Consent Decree is fair, adequate and reasonable.

A. Factual Background

Farming is a hard way to make a living. Small **farmers** operate at the whim of conditions completely beyond their control; weather conditions from year to year and marketable prices of crops to a large extent determine whether an individual **farmer** will make a profit, barely break even or lose money. As a result, many **farmers** depend heavily on the credit and benefit programs of the United States Department of Agriculture to take them from one year to the next. n2 For instance, if an early freeze kills three-quarters of a **farmer's** crop one year, he may not have sufficient resources to buy seeds to plant in the following season. Or if a **farmer** needs to modernize his operations and buy a new grain harvester in order to make his operations profitable, he often [**7] cannot afford to buy the harvester without an extension of credit. Because of the seasonal nature of farming, it also is of utmost importance that credit and benefit applications be processed quickly or the **farmer** may lose all or most of his anticipated income for an

entire year. It does a **farmer** no good to receive a loan to buy seeds after the planting season has passed.

n2 The technical differences among USDA's various credit and non-credit programs are set forth in detail in a previous Opinion of this Court. See Pigford v. Glickman, 182 F.R.D. 341, 342-44 (D.D.C. 1998).

The USDA's credit and benefit programs are federally funded programs, but the decisions to approve or deny applications for credit or benefits are made locally at the county level. In virtually every farming community, local **farmers** and ranchers elect three to five member county committees. The county committee is responsible for approving or denying farm credit and benefit applications, as well as for appointing a county executive who [**8] is supposed to provide **farmers** with help in completing their credit and benefit applications. The county executive also makes recommendations to the county committee regarding which applications should be approved. The salaries of the county committee members and the county executives are paid from federal funds, but they are not considered federal [*87] government employees. Similarly, while federal money is used to fund the credit and benefit programs, the elected county officials, not federal officials, make the decision as to who gets the federal money and who does not.

The county committees do not represent the racial diversity of the communities they serve. In 1996, in the Southeast Region, the region in the United States with the most **African** American **farmers,** just barely over 1% of the county commissioners were **African** American (28 out of a total of 2469). See CRAT Report at 19. In the Southwest region, only 0.3% of the county commissioners were **African** American. In two of the remaining three regions, there was not a single **African** American county commissioner. Nationwide, only 37 county commissioners were **African** American out of a total of 8147 commissioners -- approximately [**9] 0.45%. Id.

Throughout the country, **African** American **farmers** complain that county commissioners have discriminated against them for decades, denying their applications, delaying the processing of their applications or approving them for insufficient amounts or with restrictive conditions. In several southeastern states, for instance, it took three times as long on average to process the application of an **African** American **farmer** as it did to process the application of a white **farmer.** CRAT Report at 21. Mr. Alvin E. Steppes is an **African** American **farmer** from Lee County, Arkansas. In 1986, Mr. Steppes applied to the **Farmers** Home Administration ("FmHA") for an operating loan. Mr. Steppes fully complied with the application requirements, but his application was denied. As a result, Mr. Steppes had insufficient resources to plant crops, he could not buy fertilizer and crop treatment for the crops he did plant, and he ended up losing his farm. See Seventh Amended Complaint at P 14.

Mr. Calvin Brown from Brunswick County, Virginia applied in January 1984 for an operating loan for that planting season. When he inquired later that month about the status of his loan application, a FmHA [**10] county supervisor told him that the application was being processed. The next month, the same FmHA county supervisor told him that there was no record of his application ever having been filed and that Mr. Brown had to reapply. By the time Mr. Brown finally received his loan in May or June 1984, the planting season was over, and the loan was virtually useless to him. In addition, the funds were placed in a "supervised" bank account, which required him to obtain the signature of a county supervisor before withdrawing any funds, a requirement frequently required of **African** American **farmers** but not routinely imposed on white **farmers.** See Seventh Amended Complaint at P 11.

In 1994, the entire county of Greene County, Alabama where Mr. George Hall farmed was declared eligible for disaster payments on 1994 crop losses. Every single application for disaster payments was approved by the Greene County Committee except Mr. Hall's application for four of his crops. See Seventh Amended Complaint at P 5. Mr. James Beverly of Nottaway County, Virginia was a successful small **farmer** before going to FmHA. To build on his success, in 1981 he began working with his FmHA office to develop a farm [**11] plan to expand and modernize his swine herd operations. The plan called for loans to purchase breeding stock and equipment as well as farrowing houses that were necessary for the breeding operations. FmHA approved his loans to buy breeding stock and equipment, and he was told that the loan for farrowing houses would be approved. After he already had bought the livestock and the equipment, his application for a loan to build the farrowing houses was denied. The livestock and equipment were useless to him without the farrowing houses. Mr. Beverly ended up having to sell his property to settle his debt to the FmHA. See id. at P 12.

The denial of credit and benefits has had a devastating impact on **African** American **farmers.** According to the Census of Agriculture, the number of **African** American **farmers** has declined from 925,000 in 1920 to approximately 18,000 in 1992. CRAT Report at 14. The farms of many **African** American **farmers**

were foreclosed upon, and they were forced out of farming. Those who managed to stay in farming often were subject to humiliation and degradation at the hands of [*88] the county commissioners and were forced to stand by powerless, as white **farmers** received preferential [**12] treatment. As one of plaintiffs' lawyers, Mr. J.L. Chestnut, aptly put it, **African** American **farmers** "learned the hard way that though the rules and the law may be colorblind, people are not." Transcript of Hearing of March 2, 1999, at 173.

Any **farmer** who believed that his application to those programs was denied on the basis of his race or for other discriminatory reasons theoretically had open to him a process for filing a civil rights complaint either with the Secretary of Agriculture or with the Office of Civil Rights Enforcement and Adjudication ("OCREA") at USDA. USDA regulations set forth a detailed process by which these complaints were supposed to be investigated and conciliated, and ultimately a **farmer** who was unhappy with the outcome was entitled to sue in federal court under ECOA. See Pigford v. Glickman, 182 F.R.D. 341, 342-44 (D.D.C. 1998). All the evidence developed by the USDA and presented to the Court indicates, however, that this system was functionally nonexistent for well over a decade. In 1983, OCREA essentially was dismantled and complaints that were filed were never processed, investigated or forwarded to the appropriate agencies for conciliation. As a result, [**13] **farmers** who filed complaints of discrimination never received a response, or if they did receive a response it was a cursory denial of relief. In some cases, OCREA staff simply threw discrimination complaints in the trash without ever responding to or investigating them. In other cases, even if there was a finding of discrimination, the **farmer** never received any relief.

In December of 1996, Secretary of Agriculture Dan Glickman appointed a Civil Rights Action Team ("CRAT") to "take a hard look at the issues and make strong recommendations for change." See CRAT Report at 3. In February of 1997, CRAT concluded that "minority **farmers** have lost significant amounts of land and potential farm income as a result of discrimination by FSA [Farm Services Agency] programs and the programs of its predecessor agencies, ASCS [Agricultural Stabilization and Conservation Service] and FmHA [**Farmers** Home Administration]. . . . The process for resolving complaints has failed. Minority and limited-resource customers believe USDA has not acted in good faith on the complaints. Appeals are too often delayed and for too long. Favorable decisions are too often reversed." Id. at 30-31.

Also [**14] in February of 1997, the Office of the Inspector General of the USDA issued a report to Secretary Glickman stating that the USDA had a backlog of complaints of discrimination that had never been processed, investigated of resolved. See Pls' Motion for Class Certification, Exh. A (Evaluation Report for the Secretary on Civil Rights Issues). The Report found that immediate action was needed to clear the backlog of complaints, that the "program discrimination complaint process at [the Farm Services Agency] lacks integrity, direction, and accountability," id. at 6, and that "staffing problems, obsolete procedures, and little direction from management have resulted in a climate of disorder within the civil rights staff at FSA." Id. at 1.

The acknowledgment by the USDA that the discrimination complaints had never been processed, however, came too late for many **African** American **farmers.** ECOA has a two year statute of limitations. See 15 U.S.C. § 1691e(f). If the underlying discrimination alleged by the **farmer** had taken place more than two years prior to the filing of an action in federal court, the government would raise a statute of limitations defense to bar the **farmer's** [**15] claims. For instance, some class members in this case had filed their complaints of discrimination with the USDA in 1983 for acts of discrimination that allegedly occurred in 1982 or 1983. If the **farmer** waited for the USDA to respond to his discrimination complaint and did not file an action in court until he discovered in 1997 that the USDA had stopped responding to discrimination complaints, the government would argue that any claim under ECOA was barred by the statute of limitations.

In 1998, Congress provided relief to plaintiffs with respect to the statute of limitations problem by passing legislation that tolls the statute of limitations for all those who filed [*89] discrimination complaints with the Department of Agriculture before July 1, 1997, and who allege discrimination at any time during the period beginning on January 1, 1981 and ending on or before December 31, 1996. See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297, Notes).

B. Procedural Background

From the beginning, this case has been a contentious and hard fought battle on [**16] both sides. The original complaint in this action was filed on August 28, 1997, by three **African** American **farmers** representing a putative class of 641 **African** American **farmers.** At an initial status conference on October 30, 1997, plaintiffs requested that the case be referred to Magistrate Judge Alan Kay for the purpose of discussing settlement. The government opposed that request. The Court refused to require the government to engage in settlement negotiations if it was not prepared to do so in good faith

and with an open mind, but it made clear that the case would move quickly.

From plaintiffs' perspective, the most important pieces of evidence necessary to ensure speedy resolution of the case were the files of the individual **farmers** that were held by the government. The Court ordered both sides to comply with their obligations under Rule 26(a)(1) of the Federal Rules of Civil Procedure by November 14, 1997, and it ordered the government to provide plaintiffs with any files in its possession on any **farmer** who was part of the putative class. See Order of November 4, 1997. The government complied with the Court's discovery ruling, and since then has continued to provide class [**17] counsel with the files of putative class members that it has. See Def's November 17, 1997, Report to the Court.

In the meantime, a number of motions to intervene were filed on behalf of putative class members represented by other attorneys. The two attorneys who originally had filed the Pigford action, Mr. Alexander Pires and Mr. Philip Fraas, stated in open court that any attorney was welcome to serve as of counsel in the case, on the condition that he or she would agree that (1) any compensation would be provided only under the attorneys' fees provisions of ECOA, 15 U.S.C. § 1691e(d), or other statutory fee-shifting provisions, and (2) he or she would neither collect any fees from individual **farmers** nor enter into a contingent fee arrangement by which the attorney would take a percentage of the **farmer's** settlement or award. Class counsel also represented that any putative class member on whose behalf a motion to intervene was filed would be added as a named plaintiff in an amended complaint.

The motions to intervene subsequently were withdrawn, and a number of lawyers entered appearances as of counsel for plaintiffs. The resulting team of lawyers in the case represents [**18] an extraordinary range of experience, specialties and geography: Mr. Pires and Mr. Fraas, both of Washington D.C., have represented **farmers** in cases against the Department of Agriculture for many years; Mr. J.L. Chestnut from Selma, Alabama, Mr. Othello Cross from Pine Bluff, Arkansas, and Mr. Dennis Sweet, from Jackson, Mississippi, all are experienced civil rights lawyers; Mr. T. Roe Frazer from Jackson, Mississippi, and Mr. Gerard Lear of Arlington, Virginia both are complex litigation and class action specialists. In addition, Mr. Hubbard Saunders, IV, an attorney from Jackson, Mississippi with nearly twenty-five years of experience, and Mr. Willie Smith from Fresno, California have worked on the case.

By mid-November of 1997, the government had rethought its original position with respect to mediation and agreed to explore the option of settlement. The parties quickly agreed upon a mediator, Mr. Michael Lewis, but an agreement on the details of the mediation process required a number of status hearings and conference calls. Finally, in late December the parties agreed to stay the case for a period of six months during which time they would pursue mediation. The parties agreed [**19] to "commence" settlement discussions on a case-by-case basis but left open the possibility of discussing a global resolution of the case. See Order of December 24, 1997.

[*90] At a status conference just over two months later, however, there appeared to be a fundamental disagreement about the process of mediation: plaintiffs wanted to negotiate a settlement structure that would address the claims of all putative class members while the government continued to want to mediate claims on a case-by-case basis. Plaintiffs' counsel, in particular Mr. J.L. Chestnut, argued that the stay had to be lifted, legal issues briefed and decided, and a prompt and firm trial date set. If mediation continued on a case-by-case basis, Mr. Chestnut argued, "Well, Your Honor can look at my gray hair; I won't live that long. Many of my clients won't live that long. . . . Please, please give my people a trial date. It took us, Judge, 15 long miserable years to get here and now they want to go case by case. That will be another 15 years of injustice. The only way you can stop it, Your Honor, is a straightforward statement to the government: Settle it or try it." Transcript of Hearing of March 5, 1998, at 37-39. [**20]

The Court lifted the stay so that the parties could brief plaintiffs' motion for class certification and plaintiffs' motion for partial summary judgment on the issue of the statute of limitations. See Order of March 6, 1998. The Court also set a trial date of February 1, 1999. Id. Upon the representations of the parties that they wanted to continue trying to mediate the case with Mr. Lewis, the Court also extended the time for mediation. See Order of April 6, 1998.

In the meantime, plaintiffs had filed a second putative class action, Brewington v. Glickman, 185 F.R.D. 82, Civil Action No. 98-1693. The putative class in Brewington included those who had filed their discrimination complaints with the USDA after February 21, 1997, the cutoff date for the putative Pigford class, but before July 7, 1998, the filing date of Brewington. With the exception of the date of filing of discrimination complaints, the allegations of the Brewington complaint mirrored those of the Pigford complaint.

On October 9, 1998, the Court granted the motion for class certification in Pigford. The Court also ordered the parties jointly to file a draft notice to class members by October [**21] 30, 1998. At a status hearing on October 13, 1998, plaintiffs informed the Court that

Congress had passed a bill that would toll the statute of limitations for **African** American **farmers** who had filed complaints of discrimination with the USDA and that they would be withdrawing their motion for partial summary judgment on the statute of limitations issue as soon as the President signed the bill into law because that motion then would be unnecessary. On October 21, 1998, President Clinton signed into law the bill tolling the statute of limitations that had been enacted by Congress. See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297, Notes). The waiver of the statute of limitations provides that "a civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the enactment of this Act, shall not be barred by any statute of limitations." An "eligible complaint" is defined, in relevant part, as "a nonemployment related complaint that was filed with the Department of Agriculture [**22] before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996" in violation of ECOA or "in the administration of a commodity program or a disaster assistance program." See id.

Faced with a February 1, 1999, trial date, the parties continued their efforts at mediation with the help of Mr. Lewis. At some point after the March 5, 1998 status hearing, the focus of negotiations shifted from case-by-case analysis to structuring a global resolution of the claims of all class members. By December 1998, the parties had informed the Court that they were very close to agreeing upon a global settlement of plaintiffs' claims in both Pigford and Brewington. Finally, on January 5, 1999, the parties filed with the Court (1) a motion to consolidate the two cases, (2) a motion to alter the definition of the class certified in Pigford to include members of the Brewington action and to certify the class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, (3) a motion [*91] for preliminary approval of a proposed Consent Decree, and (4) a notice to class members. The Court consolidated the two cases, preliminarily [**23] approved the Consent Decree, approved the notice to class members, notified class members of their right to file written objections by February 15, 1999, and scheduled a fairness hearing for March 2, 1999.

Within ten days after the preliminary approval of the Consent Decree, the facilitator mailed a copy of the Notice of Class Certification and Proposed Class Settlement to all then-known members of the class. n3 The facilitator also arranged a print notification program with one-quarter page advertisements in 26 general circulation newspapers for January 21, 1999, and in 100 **African**-American newspapers between January 13, 1999 and January 27, 1999. See Def's Memorandum in Support of Consent Decree (Declaration of Jeanne C. Finegan). The facilitator also arranged to have a full page advertisement announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in the editions of TV Guide that were distributed in an 18-state region, and a half page advertisement in the national edition of Jet Magazine. See id. In addition, the facilitator aired 44 commercials announcing the preliminary approval of the Consent Decree and the time [**24] and place of the fairness hearing on the Black Entertainment Network and aired 18 similar commercials on the Cable News Network over the course of a two-week period. The facilitator estimates that on average, the print and television notice campaign "reached 87 percent of **African**-American farm operators, managers or others in farm-related industries, an average frequency of 2.4 times." Id. at 6. As of February 19, 1999, the facilitator had received 15,132 telephone calls as a result of its notification campaign. Id. at 7.

n3 The "facilitator" is the Poorman-Douglas Corporation. See Consent Decree at P 1(i). Among other responsibilities, the facilitator is required to mail copies of the Notice of Class Certification and Proposed Class Settlement to all known class members within ten days of the Court's preliminary approval of the proposed Consent Decree and to undertake an advertising campaign notifying potential class members of the class certification and proposed class settlement. See id. at PP 3, 4.

[**25]

The USDA exerted efforts to obtain the assistance of community based organizations, including those organizations that focus on **African** American and/or agricultural issues, in communicating to class members and potential class members the fact that the Court had preliminarily approved the Consent Decree and the time and place of the fairness hearing. Def's Memorandum in Support of Consent Decree (Declaration of David H. Harris). USDA officials also were notified that, to the extent possible, they had an obligation to communicate to class members information about the Consent Decree and the fairness hearing. The Court posted a copy of the proposed Consent Decree and the Notice of Class Certification on the Internet Website of the United States District Court for the District of Columbia. Finally, class counsel held meetings in counties throughout the country, particularly in the South, to notify **farmers** of

the settlement, the process for filing a claim package and the time, place and purpose of the fairness hearing.

The Court timely received approximately eighteen written objections from organizations or individuals. See Order of February 25, 1999. The Court also received a number [**26] of letters after the February 15, 1999 deadline which it also has considered. With the exception of one objection filed after the hearing, see Order of March 11, 1999, the Court has considered all letters and filings received before and since the hearing that have expressed objections to or comments on the proposed Consent Decree. Class counsel and counsel for the government also filed memoranda in support of the proposed Consent Decree and supplemental responses to the objections raised.

The Court conducted a fairness hearing on March 2, 1999, which lasted an entire day. The Court allocated time for all objectors who previously had filed written objections to the Consent Decree and also allocated time at the end of the day for others who wished to express their views. See Order of February 25, 1999. The Court provided time for class counsel and counsel for the government [*92] to explain the proposed Consent Decree and to discuss their view of its fairness. The Court heard from representatives of eight organizations that had filed written objections, six individuals who had filed written objections and ten individuals who had not filed written objections. The Court also heard from [**27] class counsel, counsel for the government and the mediator.

After the hearing, the Court sent a letter to the parties summarizing some of the objections that had been raised at the hearing and suggesting changes to the proposed Consent Decree that might alleviate some of the concerns raised. The Court indicated that it would not issue a final ruling on the fairness of the proposed Consent Decree until March 19, 1999, in the event that the parties wanted to file a revised proposed Consent Decree addressing the concerns raised at the hearing and by the Court. By letter of March 19, 1999, the parties transmitted to the Court a revised proposed Consent Decree which includes those changes or clarifications that the parties believed they could make to the proposed Consent Decree without fundamentally altering the framework and basis for their agreement. The Court posted the revised Consent Decree to the Court's Internet Website and issued an order granting any objector leave to file any comments with respect to the revisions to the proposed Consent Decree by March 29, 1999. The revised proposed Consent Decree now is before the Court to determine whether it is fair, reasonable and adequate. [**28]

II. CLASS CERTIFICATION

The Court originally certified a class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure for purposes of determining liability. The class was defined as

> All **African**-American **farmers** who (1) farmed between January 1, 1983, and February 21, 1997; and (2) applied, during that time period, for participation in a federal farm program with USDA, and as a direct result of a determination by USDA in response to said application, believed that they were discriminated against on the basis of race, and filed a written discrimination complaint with USDA in that time period.

Pigford v. Glickman, 182 F.R.D. at 352. Plaintiffs had asserted that the class could be certified under either Rule 23(b)(2) or Rule 23(b)(3) of the Federal Rules of Civil Procedure, but the Court found that it was most appropriate for purposes of determining liability to certify a class under Rule 23(b)(2), governing class actions seeking primarily injunctive or declaratory relief. At the time, the Court also noted that "if liability is found and the case reaches the remedy stage, the Court will have to determine the most appropriate mechanism for determining remedy. [**29] It is possible that at that point it would be appropriate to certify a class pursuant to Rule 23(b)(3). . . ." Id. at 351 (*citing* Eubanks v. Billington, 324 U.S. App. D.C. 41, 110 F.3d 87, 96 (D.C. Cir. 1997) (in class action seeking both injunctive and monetary relief, court may adopt "hybrid" approach and certify (b)(2) class for former and (b)(3) class for latter)).

By Order of January 5, 1999, upon motion of the parties, the Court vacated the Order certifying the class and certified a new class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The newly certified class is defined as:

> All **African** American **farmers** who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

Order of January 5, 1999.

There are three [**30] changes to the substantive definition of the class. The first change relates to the time frame within which a class member is required to have filed his or her discrimination complaint with the USDA. Under the original class definition, a class member was required to have filed his complaint with the USDA before February 21, 1997. The putative class in Brewington included [*93] those who had filed their complaints of discrimination with the USDA between February 21, 1997, the cutoff date in Pigford, and July 7, 1998, the date of filing of the Brewington action.

The definition of the class certified by Order of January 5, 1999, modifies the class definition so that the filing date is consistent with the recently-enacted legislation tolling the statute of limitations. See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297, Notes). The legislation specifies that in order to toll the statute of limitations, a **farmer** must have filed his complaint of discrimination with the USDA before July 1, 1997, and the new class definition includes the same [**31] cut-off date. The resulting class has a broader definition than the original Pigford class but a slightly narrower definition than the proposed class definition in Brewington. The members of the proposed Brewington class who are not a part of the newly certified class -- that is, those who filed discrimination complaints after July 1, 1997 -- are on a different legal footing because the statute of limitations has not been tolled for them and resolution of their claims therefore is not appropriate in this action.

The second change also involves timing issues. The original class definition specified that class members must have farmed between January 1, 1983, and February 21, 1997, and applied for a credit or benefit program during that same time period. The definition of the class certified by Order of January 5, 1999, requires class members to have farmed or attempted to farm between January 1, 1981, and December 31, 1996, and to have applied for a credit or benefit program during that time period. As with the changed discrimination complaint filing dates, this change in class definition is consistent with the recently-enacted legislation tolling the statute of limitations. [**32] See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297, Notes).

The third change relates to the way in which a class member's complaint of discrimination was transmitted to the USDA. Under the original class definition, a class member must have filed a "written" complaint of discrimination with the USDA. The revised class definition provides that the class member must have "filed a discrimination complaint," and under the terms of the proposed Consent Decree, class members who have participated in "listening sessions" or have complained to members of Congress in certain case are deemed to have "filed" a discrimination complaint. See Consent Decree at P 1(h). None of the substantive changes to the class definition in any way affects the Court's analysis or conclusion that the case properly is certified as a class action. See Pigford v. Glickman, 182 F.R.D. at 344-45.

The primary difference between the class certified by the Court on October 9, 1998 and the class certified by the Court on January 5, 1999, is more procedural than substantive: [**33] the former was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure for purposes of determining whether the USDA is liable to class members and the latter was certified for all purposes pursuant to Rule 23(b)(3). n4 Rule 23 provides that all class members in a Rule 23(b)(3) class action are entitled to notice and an opportunity to exclude themselves from -- or "opt out" of -- the class and pursue individual remedies. See Rule 23(c)(2), Fed. R. Civ. P. The Rule contains no explicit opt-out provision with respect to a class certified pursuant to Rule 23(b)(1) or Rule 23(b)(2), although a court [*94] may have discretion to permit class members to opt out of the class in (b)(1) and (b)(2) actions. See Eubanks v. Billington, 110 F.3d at 92-95. The parties in this case agreed that it was more appropriate -- and fairer to members of the class -- to ask the Court to certify the class under Rule 23(b)(3) for all purposes, particularly since the proposed settlement involves primarily monetary relief. See id. at 95. The decision to certify the class pursuant to Rule 23(b)(3) was made largely in order to allow class members to opt out of the class if they wanted to [**34] pursue their remedies individually either before the USDA or by separate court action.

n4 An action may appropriately be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

An action may appropriately be certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure if the Court finds that "the questions of law or fact common to the members

> of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The Court already has determined that a class exists and that the class meets the four criteria of Rule 23(a) of the Federal Rules of Civil Procedure. See Pigford v. Glickman, 182 F.R.D. at 346-50. Because [**35] the Court has certified the class under Rule 23(b)(3) of the Federal Rules of Civil Procedure, it also must ensure that the separate and additional requirements of (b)(3) are satisfied before approving the proposed settlement. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 622, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) (court's fairness analysis for settlement purposes under Rule 23(e) cannot substitute for determination whether class is appropriately certified in the first place); Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir.) (requirements of predominance and superiority in subsection (b)(3) are additional to requirements of subsection (a) which apply to all class actions), *cert. denied*, 142 L. Ed. 2d 480, 119 S. Ct. 576 (1998).

Rule 23(b)(3) requires the Court to find (1) that questions of law or fact common to members of the class predominate over questions affecting only individual members, and (2) that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3), Fed. R. Civ. P. It is designed to cover cases in which a class action would promote "'uniformity of decision as to persons similarly [**36] situated, without sacrificing procedural fairness or bringing about other undesirable results.' The Advisory Committee had dominantly in mind vindication of 'the right of groups of people who individually would be without effective strength to bring their opponents into court at all.'" Amchem Products, Inc. v. Windsor, 521 U.S. at 615, 617 (quoting Rule 23, Fed. R. Civ. P., Adv. Comm. Notes). This is just such a case.

The ultimate settlement of this action envisions the creation of a mechanism on a class-wide basis that will then be utilized to resolve the individual claims of class members outside the traditional litigation process, most of them (Track A) in a rather formulaic way. Most members of the class lack documentation of the allegedly discriminatory transactions at issue. Without any documentation of those transactions, it would be difficult if not impossible for an individual **farmer** to prevail in a suit in federal court under a traditional preponderance of the evidence standard. The parties acknowledge, however, that it is not the fault of class members that they lack records. Since class members' lack of documentation is at least in part attributable to the passage [**37] of time which has been exacerbated by the USDA's failure to timely process complaints of discrimination, there is a common issue of whether and how best to provide relief to class members who lack documentation, and that common issue "predominate[s] over any questions affecting only individual members." See Rule 23(b)(3), Fed. R. Civ. P. This class action and its settlement as proposed in the Consent Decree provide a mechanism to address that common issue. See Amchem Products, Inc. v. Windsor, 521 U.S. at 619 ("Settlement is relevant to a class certification").

In addition to the lack of documentation making individual adjudication of most claims so difficult, the sheer size of the class makes the prospect of individual adjudication of damages virtually unmanageable. For this or any other court to adjudicate the individual claims of the 15,000 to 20,000 **African** American **farmers** now estimated to be members of the class would take years or perhaps even a decade or more. Any "fair and efficient" resolution of the claims therefore necessitates the implementation of some sort of class-wide mechanism such as the creative [*95] and speedy Track A/Track B procedures proposed by the parties [**38] in the Consent Decree. The Court therefore finds that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." See Rule 23(b)(3), Fed. R. Civ. P. The Court concludes that this action appropriately is certified for resolution pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The remaining question is whether the proposed Consent Decree is fair, adequate and reasonable under Rule 23(e).

III. PROVISIONS OF PROPOSED CONSENT DECREE

The proposed Consent Decree, as revised after the fairness hearing and jointly filed by the parties on March 19, 1999, is a negotiated settlement that resolves all of the claims raised by plaintiffs in the Seventh Amended Complaint. The purpose of the Consent Decree is to ensure that in the future all class members in their dealings with the USDA will "receive full and fair treatment" that is "the same as the treatment accorded to similarly situated white persons." Consent Decree at 1-2. As with all settlements, it does not provide the plaintiffs and the class they represent with everything they sought in the complaint. Instead it is a negotiated settlement intended to achieve much [**39] of what was sought without the need for lengthy litigation and uncertain results. See Stewart v. Rubin, 948 F. Supp. 1077, 1087 (D.D.C. 1996) ("inherent in compromise is a yielding of absolutes and an abandoning of highest hopes"), *aff'd* 326 U.S. App. D.C. 337, 124 F.3d 1309 (D.C. Cir. 1997). It is impossible to know precisely how much the overall settlement in this case will cost the government, in part because the exact size of the class has not been

determined and because the Consent Decree provides for debt relief that is dependent on the amount of debt that individual class members owe to the USDA, but plaintiffs estimate that the settlement is worth at least $ 2.25 billion, the largest civil rights settlement in the history of this country. See Pls' Response to Post-Hearing Submissions at 7.

The Consent Decree accomplishes its purposes primarily through a two-track dispute resolution mechanism that provides those class members with little or no documentary evidence with a virtually automatic cash payment of $ 50,000, and forgiveness of debt owed to the USDA (Track A), while those who believe they can prove their cases with documentary or other evidence by a preponderance of the evidence [**40] -- the traditional burden of proof in civil litigation -- have no cap on the amount they may recover (Track B). Those who like neither option provided by the Consent Decree may opt out of the class and pursue their individual remedies in court or administratively before the USDA. The essential terms of the proposed Consent Decree and settlement are summarized below.

Under the terms of the proposed Consent Decree, any class member has the right to opt out of the class and pursue his remedies either administratively before the USDA or in a separate court action. See Consent Decree at P 2(b). A class member who opts out of the class cannot collect any relief under the settlement, but he retains all of his legal rights to file his own action against the USDA. In other words, if a class member opts out of the class, nothing in this settlement affects him. Any class member who wishes to opt out of the class must file a written request with the facilitator within 120 days of the date on which the Consent Decree is entered. See id.

Those who choose to remain in the class have 180 days from the entry of the Consent Decree within which to file their claim packages with the facilitator. [**41] Consent Decree at P 5(c). n5 When a claimant submits his claim package, he must include evidence that he filed a discrimination claim with the USDA between January 1, 1981 and July 1, 1997. See id. at P 5(b). n6 In the absence of documentation [*96] that a complaint was filed with the USDA, a claimant may submit a declaration from "a person who is not a member of the claimant's family" stating that he or she has first-hand knowledge that the claimant filed the complaint. See id. n7 A claimant also must include a certification from an attorney stating that the attorney has a good faith belief in the truth of the factual basis of the claim and that the attorney will not require compensation from the claimant for his or her assistance. See id. at P 5(e). n8

n5 The Court may grant an extension of this 180 day period "where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control." Consent Decree at P 5(g).

n6 For a claimant who otherwise meets the class definition but who filed his complaint of discrimination after July 1, 1997, the claims package will be forwarded to JAMS-Endispute, Inc. JAMS-Endispute, Judicial Arbitration and Mediation Services Endispute, is a California-based corps of retired judges with offices throughout the country that provides alternative dispute resolution mechanisms. JAMS-Endispute will determine whether the claimant should be allowed to proceed as a class member despite his failure to timely file his discrimination complaint. See Consent Decree at PP 1(a)(ii), 6. [**42]

n7 For purposes of the proposed Consent Decree, a "discrimination complaint" means either a communication directly from the class member to the USDA or a communication from the claimant to a member of Congress, the White House, or a state, local, or federal official who forwarded the communication to the USDA asserting that the USDA had discriminated against the claimant on the basis of race in connection with a federal farm credit transaction or benefit application. Consent Decree at P 1(h).

n8 Class counsel is available to perform these services without charge to the claimant.

At the time that they submit their claim packages, claimants asserting discrimination in credit transactions also must choose between two options: adjudication of their claims under the Track A mechanism or arbitration of their claims under the Track B mechanism. Consent Decree at P 5(d). n9 The choice made between Track A and Track B has enormous significance. Under Track A, the class member has a fairly low burden of proof but his recovery is limited. Under Track B, there is a higher burden of proof but the recovery [**43] is unlimited. The claims facilitator, the Poorman-Douglas Corporation, has 20 days after the filing of a claims package within which to determine whether the claimant is a member of the class and, if he is, to forward the materials to counsel for the USDA and to the appropriate Track A or Track B decision-maker. Id. at P 5(f)

n9 Claimants asserting discrimination in non-credit benefit programs are only entitled to proceed under Track A. Consent Decree at P 5(d).

Under Track A, a claimant must submit "substantial evidence" demonstrating that he or she was the victim of race discrimination. See Consent Decree at PP 9(a)(i), 9(b)(i). Substantial evidence means something more than a "mere scintilla" of evidence but less than a preponderance. See Burns v. Office of Workers' Compensation Programs, 309 U.S. App. D.C. 400, 41 F.3d 1555, 1562 n. 10 (D.C. Cir. 1994). Put another way, substantial evidence is such "relevant evidence as a reasonable mind might accept to support [the] conclusion," even when "a [**44] plausible alternative interpretation of the evidence would support a contrary view." Secretary of Labor v. Federal Mine Safety and Health Review Comm'n, 324 U.S. App. D.C. 154, 111 F.3d 913, 918 (D.C. Cir. 1997). n10

n10 The Consent Decree defines "substantial evidence" as "such relevant evidence as appears in the record before the adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion." Consent Decree at P 1(l).

A claimant asserting discrimination in a credit transaction can satisfy this burden by presenting evidence of four specific things: (1) that he owned or leased, or attempted to own or lease, farm land; (2) that he applied for a specific credit transaction at a USDA county office between January 1, 1981 and December 31, 1996; (3) that the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide [**45] appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white **farmers;** and (4) that USDA's treatment of the loan application led to economic damage to the class member. See Consent Decree at P 9(a)(i). A claimant asserting discrimination only in a non-credit benefit program can satisfy his burden by presenting evidence (1) that he applied for a specific non-credit benefit program at a USDA county office between January 1, 1981 and December 31, 1996, and (2) that his application was denied or approved for a lesser amount then requested and that such treatment was less favorable [*97] than that accorded to specifically identified, similarly situated white **farmers.** See id. at P 9(b)(i).

The USDA has sixty days after it receives notice of a Track A referral to provide the adjudicator and class counsel with any information relevant to the issues of liability and damages. Consent Decree at P 8. After receiving any material from the USDA, the facilitator will either make a recommendation with respect to whether the claim should be approved or indicate its inability to make a recommendation. The entire packet of material, [**46] including the submissions by the claimant and the USDA and the recommendation of the facilitator, then is referred to a member of JAMS-Endispute, Inc., for a decision which is to be made within 30 days. See id. at P 9(a). That decision is final, except that the Monitor, whose responsibilities are discussed further below, shall direct the adjudicator to reexamine the claim if he determines that "a clear and manifest error has occurred" that is "likely to result in a fundamental miscarriage of justice." See id. at PP 9(a)(v), 9(b)(v), 12(b)(iii).

If the adjudicator finds in the claimant's favor and the claim involves discrimination in a credit transaction, the claimant will receive (1) a cash payment of $ 50,000; (2) forgiveness of all debt owed to the USDA incurred under or affected by the program that formed the basis of the claim; (3) a tax payment directly to the IRS in the amount of 25% of the total debt forgiveness and cash payment; (4) immediate termination of any foreclosure proceedings that USDA initiated in connection with the loan(s) at issue in the claim; and (5) injunctive relief including one-time priority loan consideration and technical assistance. Consent Decree [**47] at PP 9(a)(iii); 11. If the adjudicator finds in the claimant's favor and the claim involves discrimination in a benefit program, the claimant will receive a cash payment in the amount of the benefit wrongly denied and injunctive relief including one-time priority loan consideration and technical assistance. Id. at P 9(b)(iii).

Track B arbitration is the option for those who have more extensive documentation of discrimination in a credit transaction. Under Track B, an arbitrator will hold a one day mini-trial and then decide whether the claimant has established discrimination by a preponderance of the evidence. Consent Decree at P 10. n11 Class counsel will represent any claimant who chooses Track B, or a claimant may be represented by counsel of his choice if he so desires. Track B is designed to balance the need for prompt resolution of the claim with the need to provide adequate discovery and a fair hearing. The entire Track B process will take a maximum of 240 days. During the first 180 days, there is a mechanism for limited discovery and depositions of witnesses. Following the one day mini-trial, the arbitrator will render a decision within 30 to 60 days. Id. at P 10(g). [**48]

n11 The arbitrator will either be Mr. Michael Lewis, the mediator, or will be a person selected by Mr. Lewis from a list of arbitrators pre-approved by class counsel and counsel for the government. See Consent Decree at P 1(b); Letter of March 19, 1999 from the Parties to the Court at P 1.

If the arbitrator finds that the claimant has demonstrated by a preponderance of the evidence that he was the victim of racial discrimination and that he suffered damages from that discrimination, the claimant will be entitled to actual damages, the return of inventory property that was foreclosed and other injunctive relief, including a one-time priority loan consideration. Consent Decree at PP 10(g), 11. As with Track A claims, the decision of the arbitrator is final except that the Monitor shall direct the arbitrator to reexamine the claim if he determines that "a clear and manifest error has occurred" that is "likely to result in a fundamental miscarriage of justice." See id. at PP 10, 12(b)(iii).

The proposed [**49] Consent Decree also provides for an independent Monitor who will serve for a period of five years following the entry of the decree. The Monitor will be appointed by the Court from a list of names proposed by the parties and cannot be removed "except upon good cause." Consent Decree at P 12(a). The Monitor is responsible for making periodic written reports to the Court, the Secretary of Agriculture, counsel for the government and class counsel, reporting on the good faith implementation of the Consent Decree and efforts to resolve disputes [*98] that arise between the parties under the terms of the decree. Id. at P 12(b). n12 He or she will be available to class members and members of the public through a toll-free telephone number to facilitate the lodging of Consent Decree complaints and to expedite their resolution. Id. at P 12(b)(iv).

n12 The parties indicated in their letter of March 19, 1999, that one of the changes to the original Consent Decree would be that the Monitor would provide copies of his report to the Court. That change was not reflected in the revised Consent Decree that was filed by the parties on March 19, 1999, but the parties have since filed a corrected page 21 of the revised Consent Decree so that the Monitor in fact will be required to provide copies of the report to the Court. See Notice of Filing of April 9, 1999.

[**50]

The Court retains jurisdiction to enforce the Consent Decree through contempt proceedings. Consent Decree at P 21. If one side believes that the other side has violated the terms of the Consent Decree, there is a mandatory procedure for attempting to resolve the problem with the assistance of the Monitor that the parties must follow before filing a contempt motion with the Court, but the Court remains available in the event that the terms of the decree are violated. Id. at P 13. Finally, the Consent Decree provides that class counsel shall be entitled to reasonable attorneys' fees and costs under ECOA, 15 U.S.C. § 1691e(d), and under the Administrative Procedure Act, 28 U.S.C. § 2412(d), for the filing and litigation of this action and for implementation of the Consent Decree. Id. at P 14(a).

IV. FAIRNESS OF PROPOSED CONSENT DECREE

Under Rule 23 of the Federal Rules of Civil Procedure, no class action may be dismissed, settled or compromised without the approval of the Court. Rule 23(e), Fed. R. Civ. P. Before giving its approval, the Court must provide adequate notice to all members of the class, id., conduct a "fairness hearing," and find, after notice and hearing, [**51] that the "settlement is fair, adequate and reasonable and is not the product of collusion between the parties." Thomas v. Albright, 139 F.3d at 231. In performing this task, the Court must protect the interests of those unnamed class members whose rights may be affected by the settlement of the action.

In this circuit there is "no obligatory test" that the Court must use to determine whether a settlement is fair, adequate and reasonable. Osher v. SCA Realty I, Inc., 945 F. Supp. 298, 303-04 (D.D.C. 1996). Instead the Court must consider the facts and circumstances of the case, ascertain what factors are most relevant in the circumstances and exercise its discretion in deciding whether approval of the proposed settlement is fair. n13 By far the most important factor is a comparison of the terms of the compromise or settlement with the likely recovery that plaintiffs would realize if the case went to trial. See Thomas v. Albright, 139 F.3d at 231 ("The court's primary task is to evaluate the terms of the settlement in relation to the strength of plaintiffs' case"); Isby v. Bayh, 75 F.3d 1191, 1199 (7th Cir. 1996) ("the relative strength of plaintiffs' case on the merits [**52] as compared to what the defendants offer by way of settlement, is the most important consideration"); Maywalt v. Parker and Parsley Petroleum Co., 67 F.3d 1072, 1079 (2nd Cir. 1995) ("the primary concern is with the substantive terms of the settlement: Basic to this is the need to compare the terms of the compromise with the likely rewards of litigation") (internal citations and quotations omitted). Having carefully considered all of

the objections that have been [*99] filed with the Court or expressed at the fairness hearing in relation to the strength of plaintiffs' case, the Court concludes that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties. n14

n13 The Third Circuit has adopted a nine-factor test for determining the fairness of a settlement of a class action, see Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975), while the Tenth Circuit has adopted a four factor test, see Gottlieb v. Wiles, 11 F.3d 1004, 1014 (10th Cir. 1993), and the Eleventh Circuit has developed a six factor test. See Bennett v. Behring Corp., 737 F.2d 982 (11th Cir. 1984). Other circuits, including ours, have not imposed such rigid sets of factors, instead recognizing that the relevant factors may vary depending on the factual circumstances. See Thomas v. Albright, 139 F.3d at 231; Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375-76 (9th Cir. 1993), *cert denied sub nom*, Reilly v. Tucson Elec. Power Co., 512 U.S. 1220, 129 L. Ed. 2d 834, 114 S. Ct. 2707 (1994). To the extent that the factors enumerated by the other circuits are at all relevant to the determination of whether this Consent Decree is fair, adequate and reasonable, however, the Court has considered and addressed those factors in this Opinion. [**53]

n14 The Court has received written objections or comments from the following organizations: Black **Farmers** and Agriculturists Assoc.; Black **Farmers** of North Carolina; Central Piedmont Economic Assoc.; Concerned Black **Farmers** of Tennessee, Arkansas, Mississippi, Georgia and North Carolina; Coordinating Council of Black Farm Groups; Kansas Black **Farmers** Assoc.; Land Loss Prevention Project; Federation of Southern Cooperatives Land Assistance Fund; Lawyers' Committee for Civil Rights Under Law; NAACP; National Black **Farmers;** National Council of Community Based Organizations in Agriculture; National Family Farm Coalition; Oklahoma Black **Farmers** and Agriculturalists Assoc.; and United States Dept. of Agriculture Coalition of Minority Employees.

The Court has received written objections or comments from the following individuals (on behalf of themselves and/or on behalf of other class members): Theodore F.B. Bates; Robert R. Binion; Abraham Carpenter, Jr.; Leonard C. Cooper; Harold M. Dunkelberger; George and Larry Ephfrom; Percy Gooch, Sr.; Estell Green, Jr.; Patricia Gibson Green; Brown J. Hawkins; Clarence Hardy; George and Patricia Hildebrandt; George Hobbs; Dave J. Miller; Jessie Nimmons; Timothy C. Pigford; Amelia Roland Washington; Roy L. Rolle, Jr.; Luis C. Sanders; Herbert L. Skinner, Jr.; Gregory R. Swecker; V.J. Switzer; George M. Whitehead; Gladys R. Todd and Griffin Todd, Sr.; Andrew Williams; Jerome Williams; and Eddie and Dorothy Weiss.

All of the organizations and most of the individuals who had submitted written comments or objections spoke at the hearing on March 2, 1999. In addition, the following individuals spoke at the hearing: Mattie Mack; Kevin Pyle; Sherman Witchler; Eddie Slaughter; Ridgeley Mu'Min Muhammed; Willie Frank Smith; John Bender; Troy Scroggins; and Willie Head.

All of the objections and comments, whether received in the form of letters to the Court or as formal filings, have been filed as part of the official record of this case. To the extent possible, the Court has attempted to address all of the objections that have been raised. Whether or not specifically mentioned in this Opinion, the Court has carefully considered the objections and appreciates the extent to which the objectors have shared their thoughts and views.

[**54]

A. The Process of Settlement

Preliminarily, the Court considers those objections that address the fairness of the way in which the settlement negotiations were conducted, the amount of discovery completed at the time of settlement, the definition of the class, whether there is any evidence of collusion between class counsel and counsel for the government, and whether class members have had adequate notice and opportunity to be heard on the proposed settlement. See Thomas v. Albright, 139 F.3d at 231; Durrett v. Housing Authority of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990); Mars Steel v. Continental Ill. Nat. Bank and Trust, 834 F.2d 677, 683 (7th Cir. 1987); Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975); Osher v. SCA Realty I, Inc., 945 F. Supp. at 304.

1. Timing of Settlement and Extent of Discovery Completed

Some of the objectors maintain that settlement came too early and that class counsel undertook insufficient discovery in this case before settling it. A review of the history of the case, however, reveals that "there has been a literal mountain of discovery provided and reviewed." Transcript of Hearing of March 2, 1999 at 170 (Comments [**55] of Mr. J.L. Chestnut). Less than three months after the case was filed, the Court ordered the USDA to open its files to plaintiffs within fifteen days. On the fifteenth day, the government provided plaintiffs with ten boxes of documents containing approximately 35,000 to 40,000 pages of records related to approximately 105 pending claims of race discrimination. See Def's November 17, 1997 Report to the Court, Declaration of Arnold Grundeman at P 4. Three days later, the government delivered an additional 20,000 pages related to another 30 pending cases of discrimination. See id. at P 5. At the time, the government represented that it was continuing to search for files, many of which had already been sent to a federal records repository. Since that time, the government has continued to provide plaintiffs with the files of class members.

The problem for plaintiffs has been that files simply do not exist for many class members. Providing additional time for discovery would not have solved that problem. As class counsel has pointed out, on the issue of liability of the USDA, the government's own [*100] documents and own admissions are the most damning evidence. See Transcript of [**56] Hearing of March 2, 1999 at 184 (Comments of Mr. Alexander Pires) ("I have an office full of admissions. I have tape recordings of Mr. Glickman. I have tape recordings of Governemnt officials. I've interviewed everybody there is to interview. I have documents. I have the CRAT Report annotated. I have all the [Office of the Inspector General] Reports"). There really was no other discovery that could have made a difference. The same is true on the issue of damages. The government delivered to class counsel all of the files it had on individual class members. But without documentary evidence that does not exist, an individual **farmer** would be hard-pressed to provide evidence beyond his own testimony, and additional discovery from the government would not be helpful.

In addition, a relatively extensive amount of litigation had occurred by the time the parties agreed to a settlement. The issue of class certification had been extensively briefed by the parties and decided by the Court. Plaintiffs' motion for summary judgment on the issue of the statute of limitations was fully briefed when the statute of limitations was tolled by legislative action. The government also had filed a motion [**57] for judgment on the pleadings and for partial summary judgment that was fully briefed. In sum, the discovery, investigation and legal research conducted by class counsel before entering into settlement was thorough and supports the fairness and reasonableness of the settlement. See Isby v. Bayh, 75 F.3d at 1200.

2. Class Definition

The class is defined to include all **African** American **farmers** who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application. Some characterize this class definition as too narrow. They claim that the class should be broadened to include all **African** American **farmers** who claim to have faced discrimination in credit transactions or benefit programs with the USDA, regardless of whether they filed a complaint of discrimination with [**58] the USDA.

The legal issues for those who never have filed a discrimination complaint, however, are much more difficult than those facing the members of the class as currently defined. The statute of limitations issue still exists for those who never have filed complaints of discrimination because Congress tolled the statute of limitations only for those who filed discrimination complaints by July 1, 1997. Moreover, from the beginning, plaintiffs' complaint only sought relief for those who had filed discrimination complaints with the USDA. Accordingly, the Consent Decree in this case cannot provide relief for those who never purported to complain to the USDA in any way about the alleged discrimination. Cf. United States v. Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448, 1460 (D.C. Cir. 1995).

Some also have objected that the class as currently defined does not include all members of the putative Brewington class because under the current class definition, the **farmer** is required to have filed a complaint of discrimination prior to July 1, 1997, while the proposed class in Brewington would have included **African** American **farmers** who had filed their discrimination complaints [**59] prior to July 7, 1998. As previously discussed, see page 20 above, the statutory waiver of ECOA's two-year statute of limitations as recently enacted by Congress applies only to those **farmers** who filed complaints of discrimination by July 1, 1997. The claims of those who do not meet that deadline face separate and additional legal barriers not faced by the class as currently defined. Broadening the class would inject legal and factual issues into the case

that are not now present and would only serve to hinder a fair, reasonable and adequate settlement for the **African** American **farmers** who are a part of the class as currently defined. The Court therefore concludes that this class definition is appropriate.

[*101] The Consent Decree also requires each class member to provide proof that he filed a "discrimination complaint" with the USDA. The term "discrimination complaint" is defined broadly to include "a communication from a class member directly to USDA, or to a member of Congress, the White House, or a state, local or federal official who forwarded the class member's communication to USDA, asserting that USDA had discriminated against the class member on the basis of race in connection [**60] with a federal farm credit transaction or benefit application." Consent Decree at P1(h). In the absence of specified documents, a class member may submit an affidavit from a non-family member stating that he or she has personal knowledge that a discrimination complaint was filed and describing the way in which it was filed. See Consent Decree at P 5.

Some objectors maintain that it is unfair to require an affidavit from someone who is not a family member because, as Mr. Vernon Breckinridge put it, "getting loans from USDA is just like you go to a normal bank and get a loan. You don't normally go around and tell everybody in the neighborhood that you've gone to the bank to secure a loan." Transcript of Hearing of March 2, 1999 at 101. While it may be that some will be precluded from obtaining relief because they cannot use affidavits from family members, the class membership determination is designed to be mechanistic so that it can be done quickly by the facilitator. If family members were permitted to submit affidavits, the facilitator would be required to make credibility determinations that inevitably would slow the process of determining class membership.

3. Asserted Collusion [**61]

The Court finds that there is absolutely no evidence of collusion between the class counsel and counsel for the government. See Thomas v. Albright, 139 F.3d at 231. From the outset, all settlement negotiations were conducted in the presence of the mediator, Mr. Michael Lewis, a neutral and detached mediator with twenty-five years of experience who has mediated many complex class action cases including employment and environmental cases. Mr. Lewis has stated quite emphatically that there was no collusion in this case: "If this case represented collusion or the negotiations in this case represented collusion I as a mediator never ever want to mediate a case in which the parties are at each others' throats. To term this negotiation intensive . . . understates the difficulty. This was an arduous negotiation. It took a year. It was hard fought." Transcript of Hearing of March 2, 1999 at 21-22.

Nor has the Court has seen any evidence of collusion or other impropriety on the part of counsel on either side. From the day this case was filed, Mr. Alexander Pires has tenaciously asserted that his clients had a right to receive relief from the government. Even faced with difficult statute [**62] of limitations issues and a serious lack of documentation, he has never wavered from his fundamental position that the government had wronged generations of **African** American **farmers** and must provide compensation. Even when settlement negotiations were ongoing, both sides maintained their positions and continued to assert the interests of their respective clients in every filing and at every status conference. At the status hearing on March 20, 1998, for example, Mr. Chestnut pleaded for a trial date because he had no faith that the case would settle and he wanted to protect the interests of the class. Government counsel continued to file motions and protect the legal interests of the USDA. Certainly the Court can attest to the fact that the parties litigated vigorously all of the issues that were or logically could have been raised.

4. Notice, Opportunity to Be Heard and Reaction of the Class

When a class is certified and a settlement is proposed, the parties are required to provide class members with the "best notice practicable under the circumstances." Rule 23(c)(2), Fed. R. Civ. P.; see Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 172-77, 40 L. Ed. 2d 732, 94 S. Ct. [**63] 2140 (1974). The Court concludes that class members have received more than adequate notice and have had sufficient opportunity to be heard on the fairness of the proposed Consent Decree. [*102] See Durrett v. Housing Authority of City of Providence, 896 F.2d at 604.

First, the timing and breadth of notice of the class settlement was sufficient under Rule 23. Notice was mailed to all known class members by January 15, 1999, nearly six weeks before the fairness hearing and a month before the deadline for comments, providing class members with ample time to submit their objections. See Maywalt v. Parker and Parsley Petroleum Co., 67 F.3d at 1079; Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1374-75 (9th Cir. 1993), *cert denied sub nom*, Reilly v. Tucson Elec. Power Co., 512 U.S. 1220, 129 L. Ed. 2d 834, 114 S. Ct. 2707 (1994). n15 The parties also exerted extraordinary efforts to reach class members through a massive advertising campaign in general circulation and **African** American targeted publications and radio and television stations. See pages 15-16 above.

n15 One objector maintains that notice was insufficient because the facilitator did not advertise in the United States Virgin Islands. With the exception of that one objection, no one appears to believe that the scope of the notice provided was insufficient.

[**64]

Second, the content of the notice was sufficient because it "fairly apprised the . . . members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." See Maywalt v. Parker and Parsley Petroleum Co., 67 F.3d at 1079 (internal quotations omitted). The notice provided class members with information on the class, the purpose and timing of the fairness hearing, opt-out procedures and deadlines, and the deadline and process for filing claims packages. In addition, it provided telephone numbers for the facilitator and for class counsel to the extent that anyone had any questions.

Third, the Court gave objectors ample opportunity to present their objections to the Consent Decree. As noted above, the Court considered all of the written objections that were filed and provided objectors with an opportunity to present their objections orally at the fairness hearing. While the Court denied a request for an evidentiary hearing made by one group of objectors, see Order of March 11, 1999, the Court is not obligated to hold an evidentiary hearing, especially in view of the fact that it accepted and considered [**65] affidavits in place of testimony. See Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 325 (10th Cir. 1984); Weinberger v. Kendrick, 698 F.2d 61, 79 (2nd Cir. 1982), *cert. denied sub nom*, Coyne v. Weinberger, 464 U.S. 818, 78 L. Ed. 2d 89, 104 S. Ct. 77 (1983); cf. United States v. Cannons Engineering Corp, 899 F.2d 79, 93-94 (1st Cir. 1990).

Finally, because the Court has received a number of objections, it is clear that class members do not unanimously support the settlement. It is significant, however, that there are relatively few objections to the settlement in comparison with the size of the class. See Thomas v. Albright, 139 F.3d at 232. This is a large class. As of March 26, 1999, 16,559 **farmers** had requested claims packages from the facilitator, and the facilitator already has received 1686 completed claim packages. By contrast, only 85 **farmer** class members have elected to opt out of the class. See Pls' Response to Post-Hearing Submissions of Objections at 6-7. Given the low rate of opt-outs and the relatively small percentage of class members objecting to the Consent Decree, the Court concludes that those objections do not warrant rejecting the [**66] Consent Decree. See Thomas v. Albright, 139 F.3d at 232 (settlement can be fair even if "a significant portion of the class and some of the named plaintiffs object to it"). n16

n16 Certain of the original named plaintiffs, including both Mr. Timothy Pigford and Mr. Cecil Brewington, have objected to the terms of the settlement. The Court has carefully considered their objections but nonetheless concludes that the settlement is fair, adequate and reasonable. See Thomas v. Albright, 139 F.3d at 232 (fact that named class representatives object to proposed settlement does not preclude court from finding that settlement is fair).

B. Substantive Fairness: Likely Recovery at Trial Compared with Terms of Proposed Settlement

As our court of appeals has said, in considering a proposed class action settlement, [*103] the Court first must compare the likely recovery that plaintiffs would have realized if they had gone to trial with the terms of the settlement. See Thomas v. Albright, 139 F.3d at 231. The Court [**67] must look at the settlement as a whole and should not reject a settlement merely because individual class members claim that they would have received more at trial. The Court should scrutinize the terms of the settlement carefully, but the discretion of the Court to reject a settlement is restrained by the "principle of preference" that encourages settlements. See Durrett v. Housing Authority of City of Providence, 896 F.2d at 604; Stewart v. Rubin, 948 F. Supp. at 1086. The Court has received approximately sixty written submissions from forty-three groups or individuals objecting to or commenting on the fairness of the settlement. The Court also heard from numerous individuals and organizations at the fairness hearing on March 2, 1999. n17 Some of the objectors have argued persuasively that the settlement could have included broader relief, but that is not the test. See Stewart v. Rubin, 948 F. Supp. at 1087 ("the Court [should not] make the proponents of the agreement justify each term of settlement against a hypothetical measure of what concessions might have been gained"). The question is whether the structure of the settlement and the substantive relief including [**68] the amount of money provided are fair and reasonable when compared to the recovery that plaintiffs likely would have realized if the case went to trial. The Court concludes that they are.

n17 With one exception, see Order of March 11, 1999, the Court has considered all objections and comments that it received by April 2, 1999. Some of those who have submitted objections do

not appear to be members of the class and therefore lack standing to challenge the fairness of the Consent Decree, see Mayfield v. Barr, 300 U.S. App. D.C. 31, 985 F.2d 1090 (D.C. Cir. 1993), but the Court has considered their objections anyway.

The settlement provides a measure of certainty for most class members. The vast majority of class members probably will be entitled almost automatically to recovery under Track A, while Track B, which has no cap on the amount of damages available, provides those with stronger cases with the opportunity to realize greater recoveries. It is clear from the structure and terms of the settlement [**69] that class counsel were trying to strike a delicate balance between ensuring that as many class members as possible would receive compensation and ensuring that any compensation was adequate for the harm suffered. In striking this balance, class counsel were forced to recognize that most of the members of the class had little in the way of documentation or proof of their claims and likely would have recovered nothing if they were required to prove their cases by the traditional preponderance of the evidence standard. Track A was devised to provide a set amount of compensation for those class members who could meet only a minimal burden of proof, while Track B was not so limited. The Track A/Track B mechanism also ensures that this compensation is distributed as promptly as possible.

The Court is sympathetic to the reasons that various class members would have wanted class counsel to strike the balance differently in their negotiations. Nonetheless, the Court is not persuaded that striking a different balance would have been either achievable in the negotiating process or more favorable to all or even most members of the class. It certainly is not convinced that a better result would [**70] have been achieved by taking this case to trial where a substantial number of class members would have been unable to prove their claims by a preponderance of the evidence and thus would have recovered nothing. While each class member understandably wants the settlement to provide the greatest possible compensation to himself, the Court cannot conclude that the final balance struck by class counsel is anything but fair.

1. Likely Recovery If Case Had Proceeded to Trial

If the case had proceeded to trial, plaintiffs would have had in their possession strong evidence that the USDA discriminated against **African** American **farmers.** The reports of the Inspector General and the Civil Rights Action Team provide a persuasive indictment of the civil rights record of the USDA and the pervasive discrimination [*104] against **African** American **farmers.** There does not appear to be much dispute that racial discrimination has occurred throughout the USDA and that the USDA and the county committees discriminated against **African** American **farmers** for decades in evaluating their applications for farm credit and benefits. In addition, when Congress took the unprecedented action of tolling the statute of limitations [**71] for ECOA, one of plaintiffs' major obstacles to establishing defendant's liability to the class was removed.

The problem is that even with that evidence, 80 to 90 percent of the class members lack any documentary evidence of the alleged discriminatory denial of credit or benefits to them. See Pls' Response to Written Objections at 11; Transcript of Hearing of March 2, 1999 at 180 (Mr. Alexander Pires) ("What would happen . . . in this case if we went to trial? 90 percent of our clients do not have files. . . . 90 percent do not have files"). In order to recover damages under ECOA at a trial, a class member would have to be able to establish by a preponderance of the evidence a discriminatory denial of loans or terms of credit, the extent of the injury to him caused by the denial and the amount of damages he suffered. Absent any documentation, this would have been an impossible burden for the majority of class members. In addition, many class members lack any documentation to prove that they ever filed a complaint of discrimination with the USDA and therefore would have encountered great difficulty in even establishing their membership in the class. With no documentary evidence [**72] that they fall within the parameters of the class, it is not at all clear that those plaintiffs would have been able to recover anything.

Some objectors have suggested that the issue of damages could have been resolved by trying the claims of representative members of the class. See Transcript of Hearing of March 2, 1999 at 46. As Mr. Alexander Pires explained, however, "I would never take the thousands of clients we have now and say bet your claim on those 12 or 13 cases that are your lead cases. Even though we helped pick them. I know what's in those 12 cases, and that's risky." Id. at 180. In fact, class counsel discovered during the process of negotiating the settlement that mediating the cases individually was risky. When the parties were in the initial stages of settlement negotiations, they agreed to mediate twelve individual test cases: six chosen by the government and six chosen by plaintiffs. The lack of documentation presented serious obstacles to the resolution of those cases. The parties worked for an entire month trying to settle eight of those twelve cases, and at the end of that month, not one case had been resolved. See Transcript of Hearing of March 5, [**73] 1998 at 32.

Moreover, bringing this case to trial likely would have been a very complex, long and costly proposition. Practically speaking, prevailing class members likely would not have obtained relief for many years. Trial on the issue of liability was scheduled to last the month of February 1999. Trial probably would have involved a number of experts, and the government probably would have raised a number of legal issues for the Court to resolve. Even if the Court devoted all of its resources and time to deciding the issue of liability, it is unlikely that a decision would have been issued before the summer of 1999. If the Court had found the USDA liable, it then would have had to resolve the issue of remedy for each **farmer.** A mechanism for establishing class or subclass membership and for resolving issues of individual damages for each **farmer** in the class or subclass would have been necessary. If the remedy phase were tried on an individual basis for each **farmer** -- as the government might have urged again as it has in the past, because of the acknowledged lack of documentation in so many cases -- the remedial process would have dragged on for years. If the remedy phase were not [**74] tried on an individual basis for each **farmer,** it is not inconceivable that a mechanism much like that negotiated in this settlement ultimately would be utilized. Even barring the inevitable appeal that the government would have taken in the event that plaintiffs prevailed, it is unlikely that any class member would have received any recovery for his injury for many years.

By contrast, the settlement negotiated by the parties provides for relatively prompt [*105] recovery. The claim of a claimant who chooses Track A will be resolved within 110 days of the date that the claim is filed. For those who choose Track B, the wait is a little longer because of discovery and trial, but the total time required is at most 240 days from the date that the claim is filed. Because neither side may appeal, the claimant will receive his compensation long before he would have if the case had gone to trial.

2. Overall Structure of Settlement: Track A and Track B

As currently structured, class members have three options: they have 120 days after the entry of the Consent Decree within which to notify, the facilitator if they want to opt out of the class altogether, they may remain in the class and choose [**75] Track A or they may remain in the class and choose Track B. n18 Those who do not opt out have 180 days from the entry of the decree within which to file their claim packages and, for those who choose Track A, to submit their proof. Consent Decree at PP 5(c), 5(d).

n18 For those class members who allege only discrimination in a benefit transaction, Track B is not an option.

A number of class members complain that they lack sufficient information to select among these three options and that the settlement is structured to force class members to choose Track A. At meetings throughout the country, class counsel currently is making every effort to reach all class members, to explain the options and to sit down with individual class members to provide advice. See Pls' Response to Post-Hearing Submissions, Exh. C. The turnout for these meetings has been overwhelming and has far exceeded everyone's expectations: literally hundreds of **farmers** show up for each meeting. It has become clear that there are more class [**76] members than anyone had anticipated and some class members contend that although they show up at the meetings, class counsel does not have time to meet with them. Class counsel is in the midst of scheduling more meetings and providing more time for each meeting, and they have assured the Court that they will be able to meet with all class members prior to the deadline for filing claim packages.

Those who assert only discrimination in non-credit, benefit transactions, rather than discrimination in credit transactions, do not have the option of proceeding under Track B, see Consent Decree at P 5(d), and one objector complains that those who have faced discrimination in the USDA's benefit programs ought to be allowed to proceed under Track B. The problem is that programs that do not involve credit transactions are not subject to ECOA. The cause of action for those who allege discrimination in benefit programs arises solely under the Administrative Procedure Act, 5 U.S.C. § 706, which does not provide for the same measure of damages as is provided under ECOA. For that reason, those who allege only that they have suffered discrimination in a benefit program are afforded a slightly [**77] different form of relief than the relief provided for those who suffered discrimination in a credit transaction with the USDA. In other words, the different statutory predicates for the two different kinds of claims restricted the solutions that counsel could negotiate in each context.

A class member who selects Track A must submit "substantial evidence" demonstrating that he was a victim of race discrimination in a credit or benefit transaction with the USDA. Consent Decree at PP 9(a), 9(b). Some have objected that the "substantial evidence" standard is too high a burden of proof. Part of that concern stems from a misunderstanding of the "substantial evidence" standard. While the phrase "substantial evidence" makes it sound as though the burden of proof is high, the substantial evidence standard

actually is one of the lowest possible burdens of proof known to the law. A "substantial evidence standard" is significantly easier for the claimant to meet than a "preponderance of the evidence" standard. A "preponderance of the evidence" standard means that the claimant has to show that it is more likely than not that discrimination happened, while under a "substantial evidence" standard, [**78] the claimant only has to provide a reasonable basis for the adjudicator to find that discrimination happened. [*106] See Consent Decree at P 1(l); see also page 28 above. The substantial evidence standard therefore should not be a bar to the claims of most class members.

In order for a claimant to prevail under Track A, he must present specified evidence, including evidence that he was treated less favorably than a "specifically identified, similarly situated" white **farmer.** See Consent Decree at PP 9(a)(i)(C), 9(b)(i)(B). Some objectors contend that it will be too difficult for some claimants to present evidence of a specific, similarly situated white **farmer** who received more favorable treatment, especially since there is no right to discovery under Track A. At this point, however, class counsel has amassed a significant amount of material regarding the treatment by the USDA of both **African** American **farmers** and white **farmers,** and claimants will be able to call upon that material in completing their claim packages. Class counsel should be able to provide most claimants with the evidence they need.

Under Track B, after limited discovery the claimant has a one day mini-trial before [**79] an arbitrator, and the claimant has the burden of establishing by a preponderance of the evidence that the USDA discriminated against him in a credit transaction. There are a number of objections to the Track B mechanism. First, the original Consent Decree defined Track B arbitrators as Michael Lewis and "any other person or person who he assigns to decide Track B claims." Some objectors contended that the definition of arbitrator was too vague and that those who were thinking about choosing Track B would have no way of knowing who the arbitrator might be. As Mr. James Morrison put it, "If Mr. Lewis chooses to have distinguished jurists, lawyers, former judges, I think he has that right as the four corners of the document gives him the authority. But if he wishes to choose Mickey Mouse, he could choose Mickey Mouse." See Transcript of Hearing of March 2, 1999 at 75. The parties addressed this concern in the revised Consent Decree by defining arbitrators as either Michel Lewis or "other person or persons selected by Mr. Lewis who meet qualifications agreed upon by the parties and by Mr. Lewis and whom Mr. Lewis assigns to decide Track B claims. . . ." See Consent Decree at P [**80] 1(b). The parties have specified that Mr. Lewis will "develop a single list of alternates which the parties would pre-approve and from which Mr. Lewis can select an arbitrator for any arbitration that he is unable to handle himself." See Letter of March 19, 1999 from Parties at P 1. While a claimant may not know the identity of the arbitrator at the time that the claimant chooses Track B, he will know who the potential candidates are and that they were not unilaterally selected by Mr. Lewis. In addition, class counsel can provide background information about the people on the list so the claimant will be able to make a more informed decision about whether he wants to select Track B.

Track B provides for limited discovery prior to the one day mini-trial. Discovery is limited essentially to an exchange of lists of witnesses and exhibits and depositions of the opposing side's witnesses. See Consent Decree at P 10(b)-(d). Some contend that discovery should be much broader. While it undoubtedly is true that the Track B mechanism anticipates less discovery than is ordinarily provided in the course of civil litigation, the Track B mechanism also resolves the claim much more quickly [**81] than an ordinary civil case would be resolved, in large part because of the shortened discovery period. Expanding the scope of discovery would take significantly more time, and class counsel in their judgment reasonably weighed the possible benefits of additional discovery, against the delays that would ensue and determined that this was an adequate amount of discovery. n19

> n19 In fact, several objectors contend that the Track B mechanism, even with the shortened discovery period, takes too long to resolve claims. It is clear from the tensions between these two sets of objections that class counsel had to strike a delicate balance between resolving Track B claims expeditiously and obtaining the necessary discovery, and the balance finally struck appears eminently reasonable to the Court.

A hearing on a Track B claim lasts eight hours. Consent Decree at P 10(f). There is no live direct testimony. All direct testimony [*107] is submitted in writing. The eight hours at the hearing are comprised entirely of cross-examinations: [**82] each side is allotted four hours to cross-examine any witness of the opposing side. Several objectors contend that the claimant should be able to present live direct testimony, rather than presenting it only in written form. As with the Track B discovery issue, class counsel clearly was trying to balance the need for expedition with the need to ensure that the process produces just results. Again, the Court cannot conclude that the balance that counsel

ultimately struck renders the terms of the settlement unfair. n20

n20 The Court also notes that it is not unprecedented to conduct hearings in this way, even in trials in federal court. See Transcript at 51; Charles R. Richey, "Rule 16 Revised and Related Rules: Analysis of Recent Developments for the Benefit of Bench and Bar," 157 F.R.D. 69, 83-84 (1994).

----------End Footnotes----------

In order to prevail on his claims, a Track B claimant must prove by a preponderance of the evidence that "he was the victim of racial discrimination and that he suffered damages therefrom." See Consent [**83] Decree at P 10(g). One objection maintains that this standard is too high and that claimants will be unable to meet this standard. To the extent that a claimant is concerned that he lacks sufficient evidence to meet the preponderance of the evidence standard, the traditional standard in civil litigation in all states and federal courts in this country, Track A provides a safer option. A claimant who cannot meet the preponderance of the evidence standard is not barred from all relief; instead, he is required to choose Track A rather than choosing Track B. Another objector also contends that a Track B claimant should not be required to establish economic damage in order to prevail on a Track B claim, and that the claimant should be able to prevail even if he can only establish emotional injury. As class counsel has pointed out, however, the economic damage requirement stems from ECOA, which provides the cause of action for all Track B claimants.

Some objectors complain about the Track A/Track B structure because those claimants who select Track B and fail to demonstrate by a preponderance of the evidence that they were the victims of race discrimination and that they suffered economic [**84] harm as a result will recover nothing under the settlement, see Consent Decree at P 10(h), rather than being permitted to proceed under Track A if they lose under Track B. The decision whether to proceed under Track A or under Track B therefore takes on a great deal of significance. If a claimant who has sufficient evidence to meet Track A requirements but insufficient evidence to prevail in Track B nonetheless chooses Track B, he will receive nothing.

As class counsel and counsel for the government have pointed out, however, there simply is no way that those who fail on a Track B claim could be permitted to proceed under Track A without entirely undermining the settlement. The settlement is designed to resolve the claims of all class members as promptly as possible. Because of the absence of documentary proof in most cases, the vast majority of claimants will select Track A, and Track A is designed to be a mechanistic way to deal with claims very quickly. Track B, by contrast, involves a much lengthier, fact-specific inquiry, but it is anticipated that very few class members will opt for Track B. If there were a fallback mechanism to provide relief for claimants who failed in [**85] their Track B claims, every class member would choose Track B and the settlement structure would collapse under its own weight. See Letter of March 19, 1999 from the Parties to the Court at 4 (if a class member whose claim was denied under Track B nonetheless were permitted to recover under Track A, "virtually every class member who elects to seek relief under the Decree would choose to proceed under Track B. Not only would such a change increase exponentially the cost to the parties of implementing the Decree, it also would make it impossible for the parties or the arbitrator to come close to adhering to the deadlines for disposition of Track B claims imposed by P 10(a)-(e). Thus this change would make the Decree unworkable").

Finally, the decisions of the adjudicators on Track A claims and the decisions of the arbitrators on Track B claims are final; [*108] there is no right to appeal those decisions, except that the Monitor shall direct the arbitrator or adjudicator to reexamine the claim if he determines that a "clear and manifest error has occurred" that is "likely to result in a fundamental miscarriage of justice." Consent Decree at PP 9(a)(v), 9(b)(v), 10(i), 12(b)(iii). Many [**86] objectors contend that the absence of appeal rights renders the settlement structure unfair and/or that it gives the arbitrators and adjudicators too much power. As Mr. Willie Head expressed it, "would you send your sons and daughters off to war with one bullet." Transcript of Hearing of March 2, 1999 at 165. While the objection has force, class counsel made a strategic decision not to press for appeal rights because the government would have insisted that any appeal rights be a two-way street. See Transcript of Hearing of March 2, 1999 at 179. Any appeal process inevitably would delay payments to those claimants who prevailed on their claims. Since it is anticipated that most class members will prevail under the structure of the settlement, the Court concludes that the forfeit of appeal rights was a reasonable compromise.

3. Track A Relief: The $ 50,000 Objection

Any claimant who prevails on a Track A claim for discrimination in a credit transaction will receive: (1) a cash payment of $ 50,000; (2) forgiveness of all debt owed to the USDA incurred under or affected by the program that formed the basis of the claim; (3) a tax

payment directly to the IRS in the amount of 25% [**87] of the total of the debt forgiveness and cash payment; (4) immediate termination of any foreclosure action that USDA initiated in connection with the loan(s) at issue in the claim; and (5) injunctive relief including one-time priority loan consideration and technical assistance. This relief package is the source of two objections.

Many objectors claim that a $ 50,000 cash award is insufficient to compensate them for the losses they sustained as a result of the USDA's discrimination. As Mr. Willie Head expressed it, "imagine that your home has been taken, your land has been taken, your automobile has been taken, and then you can make a decision and see if $ 50,000 will be enough for you." Transcript of Hearing of March 2, 1999 at 165-66. Putting a monetary value on the damage done to someone who has experienced discrimination at the hands of the government obviously is no easy matter, and it is probable that no amount of money can fully compensate class members for past acts of discrimination. It is quite clear, as the objectors point out, that $ 50,000 is not full compensation in most cases.

To the extent that a specific value can be put on such compensation, however, class counsel [**88] have thoroughly researched the issue and provided persuasive evidence that the amount is fair. n21 As class counsel points out, every claimant who prevails under Track A will receive not $ 50,000 but at least $ 62,500 (the sum of a $ 50,000 cash payment plus $ 12,500 in tax relief). And most who prevail under Track A will receive much more than that. The government estimates that the average **African** American **farmer** carries government debt of approximately $ 100,000, and those debts will be forgiven under Track A; in addition, the settlement provides for a tax payment of 25% of the debt forgiveness. See Pls' Response to Post-Hearing Submissions, Exh. A (Declaration of Dr. Mervin J. Yetley) at P 5(c)-(d). The average cash value of relief for a claimant who prevails under [*109] Track A therefore totals $ 187,500. Id. at P 6. Class members undoubtedly would have liked to have received a larger settlement. But $ 187,500 is a significant amount of money, especially in view of the fact that a claimant who lacks the detailed records required in a normal civil action to prove his case by a preponderance of the evidence need only establish his claim by substantial evidence in order to receive [**89] that compensation. The Court therefore concludes that class counsel had an adequate basis for agreeing to this amount and that it is fair and reasonable.

n21 To the extent that objectors are claiming that class counsel had no economic basis for agreeing to settle the case for the amount they did, that argument is belied by the fact that class counsel consulted a number of economists. See Pls' Response to Post-Hearing Submissions. Moreover, while one objector submitted affidavits from other economists that contend that the value of class members' claims may have been worth more than $ 50,000, those economists do not take into account the breadth of relief provided by the settlement. See id., Exh. A (Declaration of Dr. Mervin J. Yetley).

Class counsel also conducted an extensive study of the settlement of four previous civil rights actions in which plaintiffs alleged egregious violations of civil rights, including the case brought by Japanese Americans interned during World War II and the Tuskegee case involving the claims of **African** Americans injected with syphilis as part of government experiments. See Pls' Response to Post-Hearing Submissions at 2, n.2. Class counsel reasonably concluded that this settlement, which affords class members greater monetary relief than that afforded to individuals in those four cases, was fair and adequate.

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Some objectors also contend that the tax relief provided under Track A is insufficient because it may not cover all the federal taxes owed on the settlement and because it does not cover state taxes. Any effort to determine the exact amount of federal tax owed on a settlement, however, would have required scores of auditors and inevitably would have resulted in delays. The logistical problems presented by a provision covering state taxes would have been even more complicated, since every state has a different method of assessing income taxes and different tax rates. Again, class counsel in its judgment determined that a flat tax payment was in the best interests of the class and in assuring a prompt resolution of the claims, and the Court is unwilling to second-guess that judgment.

4. Other Objections to Individual Relief

The failure of both Track A and Track B to include certain measures of individual relief also has led to objections. First, some contend that the USDA should provide relief from loans owed to creditors other than the USDA. They argue that because the USDA discriminated in its credit programs, many **African** American **farmers** either had to obtain loans from private [**91] banks at very high interest rates or had to buy their equipment and supplies on credit from private companies at high interest rates. They therefore seek to

have all of those loans forgiven or at least to have loans that were guaranteed by the USDA forgiven. Class counsel clearly tried to negotiate for as much debt forgiveness as possible. But as Mr. J.L. Chestnut put it, "There is no likelihood the United States government is going to go around to . . . commercial banks paying off private loans of black **farmers,** whether it relates to discrimination or not. Nobody is going to be able to negotiate that with the United States government. How do I know that? Because I tried." Transcript of Hearing of March 2, 1999 at 168.

Second, some have objected that the Consent Decree does not contain a provision to protect a class member's settlement award from his bankruptcy estate. The parties to this action cannot, however, determine whether the bankruptcy estate has a right to a claimant's settlement award. Those matters are controlled by operation of the bankruptcy laws and will turn on issues such as whether the claim is considered the property of the estate. See 11 U.S.C. § 541. Those [**92] matters properly are resolved in bankruptcy court between the parties to those actions and cannot be resolved by the parties to this action.

Third, a claimant who prevails under Track B is entitled to "any USDA inventory property that was formerly owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator." See Consent Decree at P 10(g)(iv). With that one exception, however, the Consent Decree has no provision for returning land to prevailing claimants. A number of objectors have stated the need for more extensive land return provisions. Again, this was a matter that class counsel clearly tried to negotiate, and they obtained the best possible resolution they could.

Finally, one objector expressed concern that the credit records of many claimants have been damaged by the discrimination they experienced at the hands of the USDA and that it therefore will be difficult for those **farmers** to obtain credit from the USDA or others in the future. In response to that objection, the parties agreed to revise the Consent Decree to include a provision stating that "outstanding debt discharged pursuant to [Track [**93] A or Track B] shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program." See Consent Decree at P 11(c). In sum, while some class members clearly [*110] would have liked the terms of the settlement to be slightly different, the terms of the settlement are fair when compared with the likely recovery plaintiffs would have obtained at trial.

C. Monitoring and Enforcement Provisions

Some objectors contend that at the very least the enforcement and monitoring provisions of the Consent Decree must be strengthened. The Consent Decree provides for the appointment of a Monitor for a period of five years to track and report on the USDA's compliance with the terms of the Consent Decree. Under the original proposed Consent Decree, the Monitor was appointed by the Secretary of Agriculture, subject to class counsels' approval. A number of objections noted that the USDA did not have any incentive to appoint a strong and independent Monitor, and that the Monitor provision therefore needed to be changed. In response to those concerns, the parties revised the Monitor provision so that the Court now appoints the Monitor from a list of [**94] names submitted by the parties. See Consent Decree at 12(a). The Monitor is removable only for "good cause."

A number of objections also noted that the original proposed Consent Decree appeared to prevent the Court from exercising jurisdiction in the event that the USDA did not comply with the terms of the decree. The law is clear that the Court retains jurisdiction to enforce the terms of the Consent Decree. See Spallone v. United States, 493 U.S. 265, 276, 107 L. Ed. 2d 644, 110 S. Ct. 625 (1989); Beckett v. Air Line Pilots Ass'n, 301 U.S. App. D.C. 380, 995 F.2d 280, 286 (D.C. Cir. 1993) (principle is well-established that trial court "retains jurisdiction to enforce consent decrees and settlement agreements"); Twelve John Does v. District of Columbia, 272 U.S. App. D.C. 235, 855 F.2d 874, 876 (D.C. Cir. 1988) (in action to enforce terms of consent decree, district court "unquestionably had power to hold the District of Columbia in civil contempt for violations of the consent decree"). The parties also have clarified that the Court retains jurisdiction to enforce the terms of the Decree.

D. Absence of Provisions Preventing Future Discrimination

The stated [**95] purpose of the Consent Decree is to "ensure that in their dealings with the USDA, all class members receive full and fair treatment that is the same as the treatment accorded to similarly situated white persons." Consent Decree at 2. The Consent Decree does not, however, provide any forward-looking injunctive relief. It does not require the USDA to take any steps to ensure that county commissioners who have discriminated against class members in the past are no longer in the position of approving loans. Nor does it provide a mechanism to ensure that future discrimination complaints are timely investigated and resolved so that the USDA does not practice the same discrimination against **African** American **farmers** that led to the filing of this lawsuit. In fact, the Consent Decree stands absolutely mute on two critical points: the full

implementation of the recommendations of the Civil Rights Action Team and the integration and reform of the county committee system to make it more accountable and representative. The absence of any such provisions has led to strong, heart-felt objections. It also has caused the Court concern. After comparing the terms of the settlement as a whole with the [**96] recovery that plaintiffs likely would have received after trial, however, the Court cannot conclude that the absence of any such prospective injunctive relief renders the settlement as a whole unfair.

There are several legal responses to the objections about the lack of forward-looking injunctive relief. First, while plaintiffs sought both declaratory and monetary relief in the complaint, they never sought an injunction requiring the USDA to restructure or to fire people who may have engaged in discrimination. See Complaint at 40-42; Seventh Amended Complaint at 60-63. All of the objectors who seek to have the USDA restructured therefore are going beyond the scope of the complaint in this case. The role of the Court in approving or disapproving a settlement is limited to determining whether the settlement of the case before it is fair, adequate and reasonable. The Court cannot reject the Consent Decree merely because it [*111] does not provide relief for some other hypothetical case that plaintiffs could have but did not bring. Cf. United States v. Microsoft, 56 F.3d at 1459-60 (court cannot "reformulate the issues" or "redraft the complaint").

Second, nothing in the Consent Decree [**97] authorizes the USDA to engage in illegal conduct in the future, and the Consent Decree therefore should not be rejected for its failure to include such prospective injunctive relief. See Isby v. Bayh, 75 F.3d at 1197 ("we cannot approve a class action settlement which either initiates or authorizes the continuation of clearly illegal conduct . . . [but] we are mindful that . . . any illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis") (internal citations and quotations omitted).

Third, even if plaintiffs had prevailed on their ECOA claims at trial, it is not at all clear that the Court could have or would have granted the broad injunctive relief that the objectors now seek. The injunctive relief that the objectors seek, essentially an injunction requiring the USDA to change the way it processes credit applications, may be authorized where plaintiffs prove a constitutional violation, see Hills v. Gautreaux, 425 U.S. 284, 297, 47 L. Ed. 2d 792, 96 S. Ct. 1538 (1976), but plaintiffs in their Seventh Amended Complaint do not allege a constitutional violation and they have not undertaken [**98] to prove one. Moreover, while ECOA authorizes the Court to "grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter," 15 U.S.C. § 1691e(c), in employing its broad equitable powers the Court must exercise "the least possible power adequate to the end proposed." See LaShawn A. v. Barry, 330 U.S. App. D.C. 204, 144 F.3d 847, 854 (D.C. Cir. 1998) (*quoting* Spallone v. United States, 493 U.S. 265, 280, 107 L. Ed. 2d 644, 110 S. Ct. 625 (1990)).

Those legal responses, however, provide little comfort to those who have experienced discrimination at the hands of the USDA and who legitimately fear that they will continue to face such discrimination in the future. The objections arise from a deep and overwhelming sense that the USDA and all of the structures it has put in place have been and continue to be fundamentally hostile to the **African** American **farmer.** As Mr. Leonard Cooper put it, "You cannot mediate . . . institutionalized racism" Transcript of Motions Hearing of March 2, 1999 at 142. Another class member expressed it more personally: "They have humiliated me and my family since [1989]. . . . And I was just [**99] wondering if there couldn't be something put in the provisions that would stop these FSA agents from humiliating and degrading [us] as they do. . . . my wife has almost had a nervous breakdown by dealing with our agent and he continues to do the same things that he has done in the past and I just wish there was some way for you to put something in that provision that would stop some of that stuff." Id. at 146.

Most fundamentally, these objections result from a well-founded and deep-seated mistrust of the USDA. A mistrust borne of a long history of racial discrimination. A mistrust that is well-deserved. As Mr. Chestnut put it, these objections reflect "fear which reaches all the way back to slavery. . . . That objection, you heard it from many today, it really asks you to retain jurisdiction over this case in perpetuity. Otherwise they say USDA will default, ignore the lawful mandates of this Court, and in time march home scot-free while blacks are left holding the empty bag again." Transcript of Hearing of March 2, 1999 at 172. The Court cannot guarantee class members that they will never experience discrimination at the hands of the USDA again, and the Consent Decree does [**100] not purport to make such a guarantee. But the Consent Decree and the Court do provide certain assurances.

First, under the terms of this Consent Decree, the USDA is obligated to pay billions of dollars to **African** American **farmers** who have suffered discrimination. Those billions of dollars will serve as a reminder to the Department of Agriculture that its actions were unacceptable and should serve to deter it from engaging in the same conduct in the future.

Second, the USDA is not above the law. Like many of the objectors, the Court was surprised and disappointed by the government's [*112] response to the Court's modest proposal that the Consent Decree include a simple sentence that in the future the USDA shall exert "best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination." Letter from the Court to Counsel, dated March 5, 1999; see Response Letter from the Parties to the Court, dated March 19, 1999. Whether or not the government explicitly states it in this Consent Decree, however, the Constitution and laws of the United States continue to forbid discrimination on the basis of race, see, eg., U.S. CONST. amend. V; 15 U.S.C. § 1691; [**101] 42 U.S.C. § 2000d, as do the regulations of the USDA. See 7 C.F.R. § § 15.1, 15.51. The actions of the USDA from now into the future will be scrutinized closely -- by class members, by their now organized and vocal allies, by Congress and by the Court. If the USDA or members of the county committees are operating on the misapprehension that they ever again can repeat the events that led to this lawsuit, those forces will disabuse them of any such notion.

Most importantly, the **farmers** who have been a part of this lawsuit have demonstrated their power to bring about fundamental change to the Department of Agriculture, albeit more slowly than some would have wanted. Each individual **farmer** may feel powerless, but as a group they have planted seeds that are changing the landscape of the USDA. As a group, they spurred Secretary Glickman in 1996 to look inward at the practices of the USDA and to examine **African** American **farmers'** allegations that the discrimination of the USDA was leading them to the point of financial ruin. As a group, they led Secretary Glickman to create the Civil Rights Action Team, a team that recommended sweeping changes to the USDA and to the county committee system. [**102] Indeed, in February 1997, the USDA Civil Rights Action Team itself recommended that the county committee system be revised by converting all county non-federal positions, including the county executive directors, to federal status, that the committee selection process by changed, that voting members of underrepresented groups be appointed to state and county committees, and that county committees be removed from any farm loan determinations. CRAT Report at 64-65.

As a group, the **farmers** mobilized a broad coalition within Congress to take the unprecedented action of tolling the statute of limitations. As a group, they brought Secretary Glickman to the negotiating table in this case and achieved the largest civil rights settlement in history. And as a group, they have made implementation of the recommendations of the CRAT Report a priority within the USDA. See Statement of February 9, 1999, by Secretary Dan Glickman, Before the Subcommittee on Agriculture, Rural Development, and Related Agencies Committee on Appropriations, United States Senate ("I also want to emphasize the importance that the President and I have placed on USDA civil rights issues; this priority is reflected in [**103] the [FY 2000] budget. The President's budget provides the necessary funding to continue to carry out the recommendations of the Civil Rights Action Team (CRAT) as well as the recommendations of the National Commission on Small Farms which supports our civil rights agenda"). While the USDA landscape has remained resistant to change for many seasons, the labors of these **farmers** finally are beginning to bear fruit. This settlement represents one significant harvest. It is up to the Secretary of Agriculture and other responsible officials at the USDA to fulfill its promises, to ensure that this shameful period is never repeated and to bring the USDA into the twenty-first century.

V. CONCLUSION

Forty acres and a mule. The government broke that promise to **African** American **farmers.** Over one hundred years later, the USDA broke its promise to Mr. James Beverly. It promised him a loan to build farrowing houses so that he could breed hogs. Because he was **African** American, he never received that loan. He lost his farm because of the loan that never was. Nothing can completely undo the discrimination of the past or restore lost land or lost opportunities to Mr. Beverly or to all of the other [**104] **African** American **farmers** whose representatives came before this Court. Historical discrimination cannot be undone.

[*113] But the Consent Decree represents a significant first step. A first step that has been a long time coming, but a first step of immeasurable value. As Mr. Chestnut put it, "Who really knows the true value, if there is one, for returning a small army of poor black **farmers** to the business of farming by the year 2000 who otherwise would never make it back? I am not wise enough to put a dollar value on that and I don't think anybody on this planet is wise enough to reduce that to dollars and cents." Transcript of Hearing of March 2, 1999 at 171. The Consent Decree is a fair, adequate and reasonable settlement of the claims brought in this case. It therefore will be approved and entered.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 4/14/99

TIMOTHY PIGFORD, et al., Plaintiffs, v. DAN GLICKMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 97-1978 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

182 F.R.D. 341; 1998 U.S. Dist. LEXIS 16299; 41 Fed. R. Serv. 3d (Callaghan) 1310

October 9, 1998, Decided
October 9, 1998, Filed

DISPOSITION: [**1] Plaintiffs' motion for class certification GRANTED; class CERTIFIED for purposes of determining liability.

LexisNexis(R) Headnotes

COUNSEL: For Plaintiffs: Alexander J. Pires, Jr., Conlon, Frantz, Phelan & Pires, Washington, DC.

For Defendant: Susan Hall Lennon/Terry Henry, U.S. Dept. Of Justice, Washington, DC.

JUDGES: PAUL L. FRIEDMAN, United States District Judge.

OPINIONBY: PAUL L. FRIEDMAN

OPINION:

[*342] OPINION

This case is before the Court on plaintiffs' motion for class certification. Upon consideration of plaintiffs' motion, the opposition filed by the government, plaintiffs' reply and the arguments presented by counsel at oral argument, the Court concludes that the class action vehicle is the most appropriate mechanism for resolving the issue of liability in this case. The Court therefore will certify a class for the purpose of determining liability.

I. BACKGROUND

Plaintiffs, four hundred and one **African** American **farmers** from Alabama, Arkansas, California, Florida, Georgia, Illinois, Kansas, [*343] Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia, allege (1) that the United States Department of Agriculture ("USDA") willfully discriminated against them when they applied for [**2] various farm programs, and (2) that when they filed complaints of discrimination with the USDA, the USDA failed properly to investigate those complaints. Fifth Amended Complaint at 53. n1

n1 Between the time the original complaint was filed and the time of oral argument on the motion for class certification, plaintiffs filed five separate motions for leave to file amended complaints. On May 22, 1998, the government indicated that it did not oppose the five motions for leave to amend, and on June 3, 1998, the Court granted plaintiffs' five motions for leave to file amended complaints. While the filing of the amended complaints had not been authorized at the time of argument on the motion for class certification, the issue since has been resolved and the Court therefore will treat the Fifth Amended Complaint as the relevant complaint for purposes of this Opinion.

On October 2, 1998, plaintiffs filed a motion for leave to file a Sixth Amended Complaint. Plaintiffs have stated that the government does not oppose the motion.

[**3]

Plaintiffs challenge the USDA's administration of several different farm loan and subsidy programs and/or agencies. Until 1994, the USDA operated two separate

programs that provided, *inter alia*, price support loans, disaster payments, "farm ownership" loans and operating loans: the Agricultural Stabilization and Conservation Service ("ASCS") and the **Farmers** Home Administration ("FmHA"). In 1994, the functions of the ASCS and the FmHA were consolidated into one newly-created entity, the Farm Service Agency ("FSA").

A **farmer** seeking a loan or subsidy from the FSA must submit an application to a county committee, comprised of producers from that county who are elected by other producers in that county. If the county committee approves the application, the **farmer** receives the subsidy or loan. If the application is denied, the **farmer** may appeal to a state committee and then to a federal review board. Under the ASCS and the FmHa, the procedure for applying for a loan or subsidy essentially was the same as the current FSA procedure, with several slight variations. If a **farmer** applied for an ASCS benefit, a County Executive Director was supposed to work with that **farmer** to help him complete [**4] his application, and the County Executive Director also was supposed to do an initial review of the application. If a **farmer** applied for a loan from FmHA, the review mechanisms available if the loan was denied differed slightly.

Under the FSA and previously under the ASCS and the FmHA, a **farmer** who believes that his application was denied on the basis of his race or for other discriminatory reasons has the option of filing a civil rights complaint either with the Secretary of the USDA or with the Office of Civil Rights Enforcement and Adjudication ("OCREA"). In the case of a **farmer** whose FmHA application was denied, the **farmer** also had the option of filing a complaint with the FmHA Equal Opportunity Office. A program discrimination complaint filed with USDA is supposed to be forwarded to OCREA, and after reviewing the complaint, OCREA is supposed to return it to the FSA for conciliation and/or preliminary investigation. The FSA then is required to forward the complaint to the Civil Rights and Small Business Utilization Staff ("CR&SBUS"), the division of FSA responsible for investigating complaints alleging discrimination within FSA's programs. CR&SBUS is required to forward the complaint [**5] to the State Civil Rights Coordinator who is supposed to attempt to conciliate the complaint and/or conduct a preliminary investigation and then report back to CR&SBUS. Ultimately, any conciliation agreement or investigatory findings are to be reported to OCREA for a final determination.

Plaintiffs allege a complete failure by the USDA to process discrimination complaints. Plaintiffs allege that in 1983, OCREA essentially was dismantled and that complaints that were filed were never processed, investigated or forwarded to the appropriate agencies for conciliation. As a result, **farmers** who filed complaints of discrimination never received a response, or if they did receive a response, it was a cursory denial of relief. In some cases, plaintiffs allege that OCREA [*344] simply threw discrimination complaints in the trash without ever responding to or investigating them.

In response to the numerous complaints of minority **farmers,** Secretary of Agriculture Dan Glickman appointed a Civil Rights Action Team ("CRAT") to "take a hard look at the issues and make strong recommendations for change." See Pls' Motion for Class Certification, Exh. B (Report of the Civil Rights Action Team) at 3. In [**6] February of 1997, the CRAT issued a report which concluded that ""minority **farmers** have lost significant amounts of land and potential farm income as a result of discrimination by FSA programs and the programs of its predecessor agencies, ASCS and FmHA. . . . The process for resolving complaints has failed. Minority and limited-resource customers believe USDA has not acted in good faith on the complaints. Appeals are too often delayed and for too long. Favorable decisions are too often reversed." Id. at 30-31.

Also in February of 1997, the Office of the Inspector General of the USDA issued a report to the Secretary of the USDA indicating that the USDA had a backlog of complaints of discrimination that had not been processed, investigated or resolved. See Pls' Motion for Class Certification, Exh. A (Evaluation Report for the Secretary on Civil Rights Issues). The Report found that immediate action was needed to clear the backlog of complaints, that the "program discrimination complaint process at [the Farm Services Agency] lacks integrity, direction, and accountability," id. at 6, and that "staffing problems, obsolete procedures, and little direction from management have [**7] resulted in a climate of disorder within the civil rights staff at FSA." Id. at 1.

The CRAT Report and the Report of the Inspector General clearly contributed to plaintiffs' decision to file this class action. Even before the reports were issued, however, minority **farmers** had alleged that the USDA discriminated on the basis of race in the administration of its farm programs. In late 1995, five **farmers** filed a lawsuit in this Court captioned Williams v. Glickman, Civil Action No. 95-1149 (now captioned Herrera v. Glickman). Williams originally was filed as a class action alleging that the USDA discriminated against minority **farmers** in the operation of its farm programs. The proposed Williams class was defined as

> All **African** American or Hispanic American persons who, between 1981 and the present, have suffered from racial or national origin discrimination in the

> application for or the servicing of loans or credit from the FmHA (now Farm Services Agency) of the USDA, which has caused them to sustain economic loss and/or mental anguish/emotion [sic] distress damages.

See Williams v. Glickman, 1997 U.S. Dist. LEXIS 1683, Civil Action No. 95-1149, Memorandum Opinion of February [**8] 14, 1997 at 7. On February 14, 1997, Judge Thomas A. Flannery denied plaintiffs' motion for class certification. Judge Flannery essentially found that plaintiffs' proposed class definition was too amorphous and overly broad and that the claims of the named plaintiffs were not typical or representative of the claims of potential class members. Judge Flannery also found that even if plaintiffs could meet the requirements of Rule 23(a) of the Federal Rules of Civil Procedure governing class actions, plaintiffs had failed to establish any of the Rule 23(b) requirements. On April 15, 1997, Judge Flannery denied plaintiffs' motion for reconsideration. n2

> n2 Most of the original Williams plaintiffs settled their claims against the USDA. The two remaining plaintiffs, both of whom are Hispanic, had pending administrative complaints with the USDA, and the court therefore stayed the lawsuit pending an administrative determination by the USDA on the merits of the administrative complaints.

II. DISCUSSION

As a preliminary [**9] matter, the Court will address the government's contention that the issue of class certification presented here has already been decided by Judge Flannery in Williams. While there are some facial similarities between plaintiffs' complaint in this case and the complaint in Williams, there also are significant differences. Most fundamentally, the gravaman of plaintiffs' complaint in this case is not just that they were subjected to discrimination when they applied for loans and subsidies but that when [*345] they filed complaints with the USDA regarding the alleged discrimination, the USDA failed properly to process and investigate those complaints. By contrast, the basis of plaintiffs' complaint in Williams was "the existence of a 'common thread of discrimination in the granting and servicing of loans by FmHA, which is a basic issue that affects all or a significant number of the putative class members.' . . . as well as the fact that they have all suffered the same 'injury' -- that is, denial of credit and loan servicing." See Williams v. Glickman, 1997 U.S. Dist. LEXIS 1683, Civil Action No. 95-1149, Memorandum Opinion of February 14, 1997 at 12. In Williams, Judge Flannery found that the class [**10] was insufficiently defined and that there was no commonality of claims because plaintiffs were "asking the Court to certify a class which would encompass every possible instance of discrimination in connection with the FmHA's making and servicing of loans." Id. at 15. By contrast, the legal and factual issues presented by plaintiffs in this case relate, in the first instance, to the USDA's processing of written complaints of discrimination (or lack thereof), and the class certification questions therefore differ significantly from those addressed in Williams.

In order to establish that they are entitled to certification of a class, plaintiffs bear the burden of showing that a class exists, that all four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure have been met and that the class falls within at least one of the three categories of Rule 23(b) of the Federal Rules of Civil Procedure. See, e.g., Hartman v. Duffey, 305 U.S. App. D.C. 256, 19 F.3d 1459, 1468 (D.C. Cir. 1994); Franklin v. Barry, 909 F. Supp. 21, 30 (D.D.C. 1995). The four prerequisites of Rule 23(a) require plaintiffs to demonstrate that (1) the class is so numerous that joinder of [**11] all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(a), Fed. R. Civ. P. Plaintiffs claim that they meet all of the prerequisites of Rule 23(a) and that a class can be certified pursuant to all three subdivisions of Rule 23(b) of the Federal Rules, but they rely primarily on Rule 23(b)(2) and (b)(3).

Plaintiffs have proposed a number of class definitions with varying degrees of specificity. The original complaint and the four amended complaints that followed define the class rather generally. The parties appear to have briefed the class certification issue on the basis of the Fourth Amended Complaint, but plaintiffs' motion for class certification uses a slightly different definition from the one contained in the Fourth Amended Complaint. Subsequently, plaintiffs sought and were granted leave to file a Fifth Amended Complaint, which contains a third definition of the class. Finally, after oral argument on the issue of class certification, [**12] plaintiffs filed a revised proposed order which has yet another definition of the class. The final proposed class definition is the most specific and responds to many of the concerns raised by the government. The Court therefore will use that definition as the basis for its analysis. The revised proposed order defines the class as follows:

> All **African**-American **farmers** who (1) farmed between January 1, 1983, and February 21, 1997; and (2) applied, during that time period, for participation in a federal farm program with USDA, and as a direct result of a determination by USDA in response to said application, believed that they were discriminated against on the basis of race, and subsequently filed a written discrimination complaint with USDA.

Plaintiffs also have proposed three subclasses pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure: (1) "**African**-American **farmers,** who have a file with Defendant, but did not receive a written determination from Defendant in response to their discrimination complaint;" (2) "**African**-American **farmers,** who have a file with Defendant, who received a written determination from Defendant in response to their discrimination complaint [**13] but said Defendant was not in accordance with the law;" and (3) "**African**-American **farmers,** who do not have a file with Defendant because their discrimination complaints were destroyed, lost or [*346] thrown away by Defendant." n3 Each subclass must independently meet the standards of Rule 23 class certification. Twelve John Does v. District of Columbia, 326 U.S. App. D.C. 17, 117 F.3d 571, 575 (D.C. Cir. 1997).

> n3 The "file" referred to in the subclass definitions apparently is a file that is maintained by the USDA when a **farmer** submits an administrative discrimination complaint. The file presumably includes the complaint, the investigation and any resolution of the complaint.

A. Existence of Class

Although Rule 23 of the Federal Rules of Civil Procedure does not specifically require plaintiffs to establish that a class exists, this is a common-sense requirement and courts routinely require it. See, e.g., Franklin v. Barry, 909 F. Supp. at 30; Lewis v. Nat'l Football League, 146 F.R.D. 5, 8 (D.D.C. [**14] 1992). The requirement that a class be clearly defined is designed primarily to help the trial court manage the class. See Hartman v. Duffey, 19 F.3d at 1471. It is not designed to be a particularly stringent test, but plaintiffs must at least be able to establish that "the general outlines of the membership of the class are determinable at the outset of the litigation." 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1760 at 118. In other words, the class must be sufficiently definite "that it is administratively feasible for the court to determine whether a particular individual is a member." Id. at 121. The government contends that plaintiffs have failed to meet this basic requirement because, as in Williams, the definition of the class are so amorphous that it is impossible to determine who is or is not a member of the class.

The Court concludes that the parameters of the proposed class as defined by plaintiffs in this case are sufficiently clear to make the proposed class administratively manageable; by looking at the class definition, counsel and putative class members can easily ascertain whether they are members of the [**15] class. The class is limited in three ways. First, the class is limited to **African**-American **farmers** who were farming at some point during the time period between January 1, 1983 and February 21, 1997. Second, the class is limited to **farmers** who applied during that same time period for participation in federal farm programs with the USDA. Finally, the class is limited to **farmers** who filed written discrimination complaints with the USDA as a result of the USDA's response to their applications for participation in the farm programs. While plaintiffs' proposed class definition does not specify the time frame within which a **farmer** must have filed a written complaint with the USDA, plaintiffs made clear at oral argument that in order to be a member of the class, a **farmer** must have filed a written complaint of discrimination with the USDA in the time period between January 1, 1983 and February 21, 1997. The Court therefore will incorporate that time limitation into the proposed class definition.

The Court also finds that the proposed subclasses are sufficiently well-defined to make the subclasses administratively feasible and that the creation of subclasses will facilitate more focused discovery, [**16] a more orderly trial, and potentially a more refined approach to mediation and settlement. See Marisol A. v. Giuliani, 126 F.3d 372, 378 (2d Cir. 1997). Subclass 1 includes any member of the class who has a file with the USDA, but who never received a written response to his or her complaint of discrimination. The parameters of this subclass are clear, and it does not appear that there will be any difficulty identifying members of this subclass.

Subclass 2 includes any member of the class who has a file with the USDA, who received a written determination in response to his or her complaint of discrimination, but who claims that the determination by the USDA was not in accordance with law. n4 The [*347] government contends that trying to determine whether a **farmer** is a member of this subclass will require an individualized determination with respect to the merits of the individual's claim that his or her

complaint of discrimination was not adequately processed or investigated and thus undermines the utility of the class action vehicle. See Hagen v. City of Winnemucca, 108 F.R.D. 61, 63 (D.Nev. 1985) (proposed class definition of "'all persons whose constitutional rights have been [**17] . . . are or may be violated by [city's unwritten prostitution policy]' . . . is insufficient, in that it would require the court to determine whether a person's constitutional rights had actually been violated in order to determine whether that person was a class member"); Williams v. Glickman, 1997 U.S. Dist. LEXIS 1683, Civil Action No. 95-1149, Memorandum Opinion of Feb. 14, 1997 at 8-9.

> n4 Plaintiffs' proposed definition for Subclass 2 defines it as all **African** American **farmers** who have a file with the USDA and "who received a written determination from Defendant in response to their discrimination complaint but said *Defendant* was not in accordance with the law." See Revised Proposed Order (emphasis added). It would appear to be more manageable to define the subclass in terms of whether the *determination* issued by the USDA was in accordance with law rather than whether the USDA was in accordance with the law, and the Court therefore will use that as the definition.

While Subclass 2 as defined by plaintiffs may require [**18] individualized determinations, a slight modification to the definition of the subclass will correct the problem. The subclass is framed primarily by two objective criteria and one subjective criterion. The two objective criteria are: (1) membership in the class, and (2) a determination from USDA with respect to the written complaint of discrimination. The third criterion for membership in the subclass is that the determination issued by the USDA "was not in accordance with the law." The problem with this criterion, as the government suggests, is that it either requires the Court to make an individualized finding with respect to whether each determination issued by the USDA was in accordance with law before the individual can be considered a member of the subclass or it requires the Court to assume that the USDA is liable and did not act in accordance with law when it made any determination with respect to a written complaint of discrimination. The problem is avoided simply by modifying the third criterion for membership in Subclass 2 to include those "who maintain that the written determination from Defendant was not reached in accordance with law." Redefining the third criterion in [**19] this way removes any need for the Court either to make an individualized merits inquiry or to assume the liability of the USDA in order to determine whether a person belongs to the subclass.

Subclass 3 is comprised of any member of the class who does not have a file with the USDA because his or her complaint never was processed. Of all of the proposed subclasses, the members of this subclass probably will be most difficult to identify, since the USDA has not maintained a file on them. Nonetheless, this subclass is sufficiently well-defined to identify its members at least for the liability stage of the litigation. Membership in the subclass is limited to persons who are members of the class, and to be a class member a **farmer** must establish that he or she filed a written complaint of discrimination with the USDA between January 1, 1983 and February 21, 1997. Although as a practical matter persons without a file may have a more difficult time establishing their membership in the class than will the members of the other two subclasses for whom there is a paper trail within the USDA, the Court nevertheless finds that the parameters of the subclass, as limited by membership in the class, [**20] are sufficiently well-defined.

B. Rule 23(a) Prerequisites

1. Numerosity

The class and all three subclasses are so numerous that joinder of all members is impracticable. See Rule 23(a)(1), Fed. R. Civ. P. Plaintiffs estimate that there are approximately 2500 members of the class. The government disputes this number and contends that plaintiffs are only speculating about the exact number of class members. Govt's Opp. at 21. Mere conjecture, without more, is insufficient to establish numerosity, but plaintiffs do not have to provide an exact number of putative class members in order to satisfy the numerosity requirement. See, e.g., Marcial v. Coronet Ins. Co., 880 F.2d 954, 957 (7th Cir. 1989); Franklin v. Barry, 909 F. Supp. at 29. This is especially true where plaintiffs allege that it is the USDA's actions of destroying complaints that has led to plaintiffs' inability to provide a more precise number. The Court therefore concludes that the numbers provided by plaintiffs sufficiently establish numerosity.

[*348] Plaintiffs have provided the names of four hundred and one named plaintiffs who they claim fall within the class definition. That alone is sufficient to establish [**21] numerosity, especially where the class members are located in different states. See, e.g., Markham v. White, 171 F.R.D. 217, 221 (N.D.Ill. 1997) (class of 35 to 40 plaintiffs sufficient to satisfy numerosity where class members resided in different states). In addition, for all of the named plaintiffs, it is not mere conjecture to assume that there are more people who have not yet been identified who will emerge. The

sheer number of amended complaints filed in this case is a result of the fact that more plaintiffs keep coming forward. It simply is not manageable to require plaintiffs to keep filing amended complaints to add the names of more plaintiffs.

Since plaintiffs have sufficiently established numerosity with respect to the class as a whole, the subclasses also are sufficiently numerous. The only subclass about which there is any serious question with respect to the numerosity requirement is Subclass 2, and plaintiffs appear to acknowledge that there are fewer members of this subclass than the other two subclasses. See Transcript at 38, 40 ("the Government gave them a decision which there's a few of them"). While there may not be as many members of Subclass 2 as there [**22] are members of the other subclasses, there appear to be a sufficient number of members of this subclass and the issues presented by this subclass are sufficiently distinct to warrant making this a separate subclass.

2. Commonality

Plaintiffs also have established that there are questions of law and fact with respect to liability that are common to the class. See Rule 23(a)(2), Fed. R. Civ. P. Plaintiffs allege that the USDA failed properly to process each class member's complaint of discrimination. For purposes of determining liability, the same factual and legal issues arise: (1) Did the USDA have a legal obligation to process and investigate complaints of discrimination that it received? (2) If the USDA had such a duty, was there a systemic failure properly to process complaints in the specified time period? (3) If there was such a systemic failure, do plaintiffs have a private cause of action against the USDA? (4) Does the government have a legitimate statute of limitations defense to the claims asserted by plaintiffs? These shared issues are more than sufficient to meet the commonality prerequisite. See Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997) [**23] ("The commonality test is met where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members"), *cert. denied*, 139 L. Ed. 2d 643, 118 S. Ct. 700 (1998).

The government contends that the factual and legal issues presented by each putative class member are distinct on two levels. First, the government contends that while some of the putative class members allege that they received no response from the USDA after they filed their discrimination complaints, other putative class members received findings of no discrimination from the USDA and still others received findings of discrimination. The government contends that the basis of the claims of each of these groups is distinct, and they therefore argue that the class action mechanism is inappropriate. The claims of these three different groups do present slightly different issues, but the class action rule does not require commonality on every fact or every issue, Franklin v. Barry, 909 F. Supp. at 30, and the Court finds that there is sufficient similarity in the claims presented by class members that the differences that do exist are best addressed through the [**24] subclass mechanism rather than by abandoning the class mechanism altogether.

The government also argues that the "underlying question here is whether or not discrimination occurred in the credit and crop subsidy transactions that each class member is alleged to have participated in . . . [Putative class members] seek redress for the discrimination that occurred in any form or any variety of forms in the transactions that the class members participated in with their local offices." Transcript at 20-21. For instance, one class member may have filed a discrimination complaint with the USDA after the County Commission in Yazoo County, Mississippi delayed his FSA [*349] emergency disaster loan, while another class member may have filed a discrimination complaint with the USDA with respect to the denial of an emergency disaster payment in Greene County, Alabama, and a third class member may have filed a discrimination complaint with the USDA after he received a lower crop subsidy through the ASCS program than he thought he was entitled to receive. The government argues that because plaintiffs have failed to identify a particular practice or policy of discrimination in the USDA that is common [**25] to all class members, there is no commonality to their claims.

The government overlooks the central fact that the unifying pattern of discrimination at issue in this case is the USDA's failure properly to process complaints of discrimination, without regard to the program that triggered the discrimination complaint. Plaintiffs' primary complaint is a pattern of "systemic racial discrimination by the USDA based upon their fraudulent act in 1983 - the disbanding of the USDA civil rights enforcement office - and the fourteen years following that fraudulent act . . . Defendant's wrongful act in 1983 and continuing wrong from 1983 to 1997 created, for each Plaintiff, the circumstances that lead to each Plaintiff's claim." Plaintiffs' Reply at 6, 8. The *damage* caused by the USDA's alleged failure to properly process the discrimination complaints may vary according to whether a class member actually was subjected to discrimination in the process of applying for a USDA program and according to the program about which he or she complained. But for purposes of liability, class members uniformly present the issue of whether the USDA, for all intents and purposes, disbanded its civil rights [**26] office in 1983 and failed, in the fourteen

years that followed, properly to process written complaints of discrimination or to process them at all. n5

n5 The government contends that an allegation that class-wide racial discrimination has occurred is insufficient by itself to establish the right to proceed as a class action. See General Telephone Co. v. Falcon, 457 U.S. 147, 157, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). Plaintiffs have alleged not just class-wide racial discrimination, but that the USDA for a period of fourteen years systematically failed to properly process written complaints of discrimination filed by **African** American **farmers.** It is the allegation of that discriminatory practice that defines this class and that entitles plaintiffs to class certification.

The claims of the members of Subclasses 1 and 3 present common issues of law and fact. The members of Subclass 2 present slightly different issues depending on whether the USDA denied them relief or granted them relief that they maintain [**27] was insufficient, but all of the members of that subclass share a common issue in addition to those shared by all class members: whether the fact that the USDA responded to their complaints precludes relief. The Court therefore finds that each subclass presents common issues of law and fact.

3. Typicality

Plaintiffs also have established that the claims of the class representatives are typical of those of the class. See Rule 23(a)(3), Fed. R. Civ. P. The typicality prerequisite is "intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented." Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 57 (3d Cir. 1994). It is satisfied if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability. Id. at 58; Marisol A. v. Giuliani, 126 F.3d at 376; Johns v. Rozet, 141 F.R.D. 211, 216 (D.D.C. 1992). Plaintiffs' Fifth Amended Complaint contains [**28] four hundred and one named plaintiffs. As discussed *supra* at 15-16, the claims of all class members arise from the USDA's alleged dismantling of its civil rights office and its subsequent failure to process discrimination complaints, the same event, practice and course of conduct that give rise to the claims of the four hundred and one representative plaintiffs.

The government contends that the claims of only three of the named plaintiffs are described in detail in the complaint and that the claims of Mr. Pigford in particular are not typical or representative of the claims of [*350] other putative class members because he previously has filed his claims in this Court, and his claims therefore may be barred on *res judicata* grounds. Since this is the second complaint filed by Mr. Pigford, the government indeed may be able to assert defenses to his claims that it could not assert against other members of the class. Moreover, upon review of the Fifth Amended Complaint, it appears that plaintiffs have not provided a detailed description of the claims of a representative of each subclass as defined in this Opinion. Because the Fifth Amended Complaint includes four hundred and one named [**29] plaintiffs who cover the spectrum of claims and interests that may be presented by the class, however, it is not too much to assume that this deficiency can be easily remedied. In order to provide greater precision and clarity as the legal and factual issues presented by each subclass are briefed and eventually tried or settled, plaintiffs shall file an amended complaint detailing the claims of at least four typical representatives of each subclass.

4. Adequacy of Representation

The final element of Rule 23(a) necessitates an inquiry into the adequacy of representation, including the quality of class counsel, any disparity of interest between class representatives and members of the class, communication between class counsel and the class and the overall context of the litigation. Twelve John Does v. District of Columbia, 117 F.3d at 575. The Court finds that class counsel and the representative class members adequately will represent the interests of the class.

First, Mr. Alexander Pires and Mr. Phillip Fraas as lead counsel and Mr. J.L. Chestnut, Mr. Othello Cross, Mr. T. Roe Frazer, Mr. Hubbard T. Saunders, IV, Mr. Gerald Lear and Mr. James Myart, Jr., all serving as of counsel, [**30] have demonstrated that they will advocate vigorously for the interests of the class. Class counsel represent a breadth of geographic coverage: they are associated with firms from Washington D.C.; Jackson, Mississippi; Selma, Alabama; Pine Bluff, Arkansas; and Arlington, Virginia. Moreover, there has been no suggestion that class counsel has not communicated with members of the class nor, given the large number of plaintiffs who have attended each hearing, could there be any such suggestion.

Second, the Court finds that there is no disparity of interest between the representative parties and members of the class as a whole. The fact that there are over four hundred named plaintiffs representing a breadth of situations and interests provides assurance that the

interests of all class members are fairly represented. To the extent that the lack of detail in the complaint with respect to particular named plaintiffs' factual situations presents a concern, that concern will be allayed when plaintiffs file a further amended complaint detailing the facts of four representatives of each subclass. See supra at 18.

Finally, the overall context of this litigation demonstrates the extent to [**31] which counsel in this case and the represented parties have worked together. At the time the original complaint was filed, only Mr. Pires and Mr. Fraas were involved. Shortly thereafter, a number of attorneys from other states moved to intervene on behalf of their clients. All of the motions to intervene now have been withdrawn, and the lawyers who filed the motions now are of counsel, working closely and in tandem with lead counsel. All (or most) have attended each hearing and, as appropriate, have participated actively. With the addition of these lawyers, it is clear that class counsel represent the spectrum of interests of the various class members.

C. Rule 23(b) Prerequisites

While plaintiffs believe they satisfy each of the subparts of Rule 23(b) of the Federal Rules of Civil Procedure, the Court concludes that the class is most appropriately certified pursuant to Rule 23(b)(2). See Rule 23(b)(2), Fed. R. Civ. P. ("the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"). Civil rights actions frequently [**32] are certified under Rule 23(b)(2), and in fact the provision was added specifically to ensure that there was a mechanism for certifying classes in civil [*351] rights cases. See 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1776 at 495; Eubanks v. Billington, 324 U.S. App. D.C. 41, 110 F.3d 87, 92 (D.C. Cir. 1997).

The government contends that plaintiffs primarily are seeking monetary rather than equitable relief and that the class therefore cannot properly be certified pursuant to Rule 23(b)(2). Plaintiffs certainly are seeking money damages. The mere fact that plaintiffs are seeking monetary relief in addition to injunctive and declaratory relief, however, does not preclude class certification pursuant to Rule 23(b)(2), "at least where the monetary relief does not predominate." Eubanks v. Billington, 110 F.3d at 92. Plaintiffs seek a variety of injunctive and declaratory remedies: they seek, *inter alia*, a declaratory judgment defining "the rights of plaintiffs and class members under defendant's farm programs including their right to equal credit, participation in farm programs, and their right to full and timely enforcement [**33] of racial discrimination complaints," and an injunction reversing as arbitrary, capricious, an abuse of discretion and contrary to law defendant's acts of denying class members credit and other benefits. See Fifth Amended Complaint at 90-94. While plaintiffs also seek monetary relief for the alleged acts of discrimination, the requested injunctive and declaratory relief, if granted, would have a significant impact on how the USDA processes its complaints and how it handles discrimination complaints currently proceeding through the administrative mechanism.

In addition, it is appropriate to certify this class pursuant to Rule 23(b)(2) because it is being certified only for purposes of determining liability. If liability is found and the case reaches the remedy stage, the Court will have to determine the most appropriate mechanism for determining remedy. It is possible that at that point it would be appropriate to certify a class pursuant to Rule 23(b)(3) (common questions of law or fact predominate over questions affecting individual members and class action is superior method for adjudication of controversy). See Eubanks v. Billington, 110 F.3d at 96 (in class action seeking [**34] both injunctive and monetary relief, court may adopt a "hybrid" approach and certify (b)(2) class as to claims for injunctive or declaratory relief and certify (b)(3) class at monetary relief stage). For the purposes of determining liability, however, the Court will certify a class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

D. Notice and Opt-Out Provisions

While Rule 23 does not specifically provide for notice and opt-out rights when a class is certified pursuant to Rule 23(b)(2), the Court in its discretion may require plaintiffs to provide notice to all class members and may provide an opportunity for class members to opt out of the class. See Rule 23(d)(5), Fed. R. Civ. P.; Thomas v. Albright, 139 F.3d 227, 234-35 (D.C. Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3156 (U.S. Aug. 24, 1998) (No. 98-326); Eubanks v. Billington, 110 F.3d at 96.

Plaintiffs in their proposed order suggest that the Court order that notice be "given to all class members to inform them of the following: i) the conditions to be met for inclusion into the class; ii) the conditions resulting in the exclusion of certain individuals from the class; iii) the [**35] alternatives to joining the class; iv) the date, time and place of hearings to be held with regard to this matter; and v) the benefits and consequences derived from joining the class." Proposed Order at 3. Since the USDA has an administrative system to process complaints of discrimination that some class members may want to use, some form of notice and opt-outs

provisions may be appropriate in this case. The parties therefore shall jointly submit a draft notice.

An Order consistent with this Opinion shall be issued this same day.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 10/9/98

ORDER

For the reasons stated in the Opinion issued this same day, the Court finds that plaintiffs have established that they meet the prerequisites for class certification of Rule 23(a) of the Federal Rules of Civil Procedure and that plaintiffs have established that the [*352] class properly is certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Accordingly, it is hereby

ORDERED that plaintiffs' motion for class certification is GRANTED; it is

FURTHER ORDERED that a class is CERTIFIED for purposes of determining liability; it is

FURTHER ORDERED that [**36] the class is defined as follows:

> All **African**-American **farmers** who (1) farmed between January 1, 1983, and February 21, 1997; and (2) applied, during that time period, for participation in a federal farm program with USDA, and as a direct result of a determination by USDA in response to said application, believed that they were discriminated against on the basis of race, and filed a written discrimination complaint with USDA in that time period.

it is

FURTHER ORDERED that the above class is divided into three subclasses, defined as follows:

> Subclass I: **African**-American **farmers,** who have a file with Defendant, but did not receive a written determination from Defendant in response to their discrimination complaint;
>
> Subclass II: **African**-American **farmers,** who have a file with Defendant, who received a written determination from Defendant in response to their discrimination complaint but who maintain that the written determination from Defendant was not reached in accordance with law; and
>
> Subclass III: **African**-American **farmers,** who do not have a **f**le with Defendant because their discrimination complaints were destroyed, lost or thrown away by Defendant.

[**37]

it is

FURTHER ORDERED that by October 23, 1998, plaintiffs shall file a further amended complaint detailing the claims of four typical representatives of each subclass; and it is

FURTHER ORDERED that the parties shall jointly file a draft notice to class members by October 30, 1998.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 10/9/98